

14 August 2013

Mark L. Millelt  
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PO Box 888  
Monroe WA 98272

David C. Ponzoha  
Clerk of the Court of Appeals  
Division II  
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RECEIVED  
AUG 16 2013  
CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

Re: Restraint of Miller  
COA No. 44691-0-II

Your Honor:

Please find enclosed for filing each of the following pleadings and documents:

- (1) Petitioner's Reply to the Response of the ISRB and Department of Corrections;
- (2) First Amended Personal Restraint Petition;
- (3) Affidavit of Mark Lee Miller.

The Amended PRP is a conformed copy of the original petition filed in this matter. Its contents are identical to the original petition filed in this matter with the following listed exceptions:

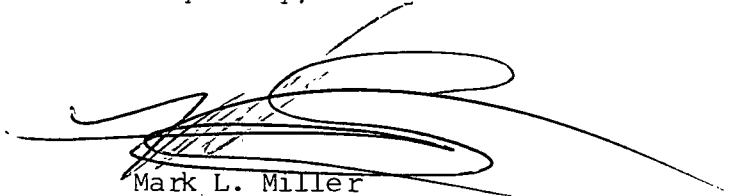
- (1) Due to its being typed it contains fewer pages; However, each paragraph is uniformly parallel to its original counterpart;

(2) There are scrivener's errors that are unique to each individual version of the Petition.

The amended petition is being provided simply as a convenience to the Court, in order to make its review of the matters easier to read and understand. Had I of had access to a typewriter for the initial petition, this amendment would have been unnecessary.

I thank you for your indulgence of this pro se petitioner's shortcomings.

Very truly,

A large, stylized handwritten signature in black ink, appearing to read 'Mark L. Miller', is written over the typed name.

Mark L. Miller

Petitioner, Pro se

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IN THE COURT OF APPEALS OF WASHINGTON

DIVISION II

In re Personal Restraint	]	No. 44691-0-II
	]	
Petition of:	]	AFFIDAVIT OF
	]	
MARK LEE MILLER,	]	<b>MARK LEE MILLER</b>
	]	
Petitioner.	]	

---

I, Mark Lee Miller, do depose and say:

- 1) I am the Petitioner in the above-entitled matter.
- 2) On the date of 3 February 2010 I was paroled from the Washington State Department of Corrections -- to a Conditional Discharge from Supervision [CDFS] with the single caveat that any criminal conviction may result in another revocation hearing.
3. After my release from State custody, I went home to the small town community of Goldendale Washington (population about 3,700). There, I determined to "come out" as an openly transgender person (Drag queen). An aspect of my personality and identity that I had kept concealed and suppressed during my thirty years under the jurisdiction of the ISRB and the Department of Corrections.

4. After I began appearing in town dressed as a woman, I became an object of ridicule -- constantly being harassed by some of the citizenry and many officers of the Goldendale Police Department.
5. On a few occasions I came into contact with Ronda Nielsen (of the Department of Corrections). On each of these occasions I withstood her ridicule and snide remarks.
6. In July of 2010, I was attacked by two men [Ricky Boyer and Adam Bronson] a victim of a hate-crime. In defending myself, Adam Bronson was superficially injured, while Ricky Boyer got away without injury.
7. Nonetheless, when the police arrived, they not only arrested myself [the "Drag Queen"], I was charged with not one - but two counts of assault in the first degree.
8. These charges were ultimately dismissed [without prejudice] upon a finding by the prosecutor that I "more probably than not was defending myself.
9. On 27 January 2011, I was arrested for a protection order violation. However, this charge was dismissed on motion of the prosecutor in April when he discovered the charge itself had been brought in "bad faith" [his words] by the local constabulary. Once again, I had represented myself, pro se.
10. On 24 May 2011, I was arrested on the charge of disorderly conduct. I once again represented myself on the matter, and once again the charges were dismissed. This time in October 2011.

11. On 16 July 2011 I was arrested by the Goldendale Police on the charge of Driving While license suspended. Once again, while representing myself, pro se, this charge was dismissed on December of 2012.
12. On 6 September 2011, I was charged with Burglary in the second degree and theft in the third degree. Again, acting pro se, the charges were dismissed in January of 2012.
13. On 6 August 2011, I was arrested on the charges of Criminal trespass and disorderly conduct (by the same officer who ordered my arrest on the previous disorderly conduct charge -- Jay Hunziker). I am representing myself in this matter still, and it has yet to be resolved.
14. I am currently engaged in civil litigation with each of these officers as well as the entire Goldendale Police Department based upon their ongoing and continuing harassment of myself and my family. (United States District Court -- Eastern District of Washington -- CV- 13 - 00149 - CI.
15. On 8 December 2011, Officer Chris Wyzkowski came to the home of my sister [where I was staying] at 523 E. Burgen, and began pounding on the door.
16. When I answered the door, he demanded that I turn over my daughter. He did not give me a reason. He did not state that he was looking for her as a suspect of a criminal investigation, nor provide any other information regarding his demand.
17. In response to his demand, I neither admitted nor denied that my daughter was at the residence. I instead asked him why he wanted my daughter.
18. In response to my request, Officer Wyzkowski told me that it was none of my business why he wanted her. "Do it or I'll come in and get her".

19. I told Officer Wyzkowski that as she is my daughter it is always my business. I then ordered him off of the property, and told him not to come back without a warrant.
20. Wyzkowski told me that he did not need a warrant, because he had probable cause.
21. I told Wyzkowski that he was in luck, because that is exactly what is needed in order to get a warrant. I then repeated my instruction to leave the property and not to return without a warrant.
22. Wyzkowski then threatened to arrest me for obstructing if I did not turn my daughter over to him. To which I responded that I would sue him and own his home if he made such a foolish attempt.
23. During this altercation two other police officers were present, and a DSHS case worker. Neither the case worker nor the police officers made any attempt to assist officer Wyzkowski, nor to interfere with his threats and harassment of myself.
24. Wyzkowski then placed his right hand on his service weapon and then both verbally and physically attempted to threaten and bully me into allowing him into the residence -- which I physically blocked with my body.
25. Due to the excessively loud noise being made by our confrontation, my sister, Angel Walkameyer (360-635-1135) and her two daughters (ages 5 and 7) were awakened and in tears when they came to the front room to see what all of the fighting was about.
26. Wyzkowski then asked my sister for permission to search her house for my daughter -- which my sister granted. I then immediately stepped out of the officer's way and allowed him passage into the residence.

27. After locating my daughter within the residence, Officer Wyzkowski then arrested me on the charge of "Unlawful Harboring of a Minor" [RCW 13.32A.080]. Under the facts alleged, the crime was legally impossible for me to commit. A parent cannot "unlawfully harbor" their own child. Moreover, RCW 13.32A.084 provides me absolute immunity from any cause of action arising from such a claim because I am her biological parent.
28. Once more, representing myself, I have the charges dismissed based upon the foregoing facts and arguments.
29. Before I am able to obtain the dismissal of the charges in East District Court of Klickitat County, Officer Wyzkowski contacts CCO3 Ronda Nielsen, of the Washington State Department of Corrections, and enlists her aid and assistance in submitting a request to the Indeterminate Sentence Review Board to revoke my discharge in retaliation for my being a drag queen who is generally successful at having the Police Department's charges dismissed when they are done simply instituted for the purposes of causing me annoyance.
30. On 9 December 2012, the Department enters into an e-mail conversation with Richard P. LaRosa, of the Indeterminate Sentence Review Board, who provides two options to try and attempt their objective. One was to issue a suspend warrant and try holding a revocation hearing. The other was to submit a special request to the board asking them to rescind the discharge based upon the misdemeanor conduct and the request by law enforcement.

31. After considering the options provided, the Department submits what is referred as "Board Special", and requests the ISRB to revoke my discharge based upon the law enforcement request. This request is submitted on the date of 20 December 2012.
32. On 22 December 2012, the ISRB revokes my discharge that was issued on 3 February 2010, without notice or hearing, based solely on the allegations submitted in the request.
33. On 29 December 2012, the board imposes conditions of supervision (without notifying me of any of those conditions) and then orders me to return to the City of Goldendale to report for supervision or be subject to a warrant for my arrest.
34. On January 11, 2013, I was arrested in Lynnwood, WA, where I had been at during the holidays and visiting my son.

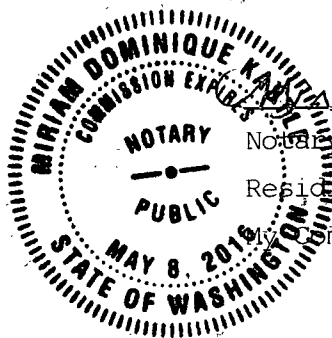
Date:

12 August 2013

  
Mark Lee Miller

Affiant

Subscribed and Sworn to before me on this 12<sup>th</sup> day of August, 2013.



Miriam Dominique Karpman  
Notary for the State of Washington

Residing at: Stromish County

My Commission Expires: 05-08-2016



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COURT OF APPEALS  
DIVISION II

2013 AUG 16 AM 11:54

STATE OF WASHINGTON

BY                       
DEPUTY

No. 44691 - 0 - II

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C O U R T   O F   A P P E A L S  
S T A T E   O F   W A S H I N G T O N  
D I V I S I O N   I I

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IN THE MATTER OF THE APPLICATION FOR

RELEASE FROM PERSONAL RESTRAINT

OF:

MARK LEE MILLER,

Petitioner

---

Petitioner's Reply to the Response

of:

Indeterminate Sentence Review Board

and the

Department of Corrections

---

Mark L. Miller  
265210 : TRU : D-618  
Petitioner, pro se  
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## TABLE OF CONTENTS

Table of State Authorities.....	ii, iii, iv
Table of Feder Authorities.....	iv
Standard of Review.....	1 - 2
IS THE ISRB AN IRREVOCABLE PART OF ESSB 6151?.....	2 - 5
DOES A PAROLEE HAVE A RIGHT TO NOTICE AND SOME KIND OF HEARING BEFORE BEING SANCTIONED WITH THE REVOCATION OF HIS CDFS BASED UPON ALLEGATIONS THAT HE VIOLATED CONDITIONS OF PAROLE?.....	6 - 12
IS THE DEPARTMENT AUTHORIZED TO REQUEST THE ISRB TO REVOKE THE CDFS OF A PAROLEE NOT BEING SUPERVISED BY THE DEPARTMENT.....	12 - 16
DOES THE FAILURE OF THE BOARD TO HOLD PETITIONER'S HEARING WITHIN THIRTY DAYS VIOLATE THE LAWS OF THE STATE OF WASHINGTON.....	16 - 18
HAS RESPONDENT OFFERED ANY EVIDENCE OR ARGUMENT TO CONTRAvene PETITIONER'S CLAIM THAT THE DEPARTMENT DID NOT HAVE LEGAL AUTHORITY TO OBTAIN A URINE SPECIMEN FROM HIM ON 27 DECEMBER 2012?.....	18
HAS RESPONDENT SUBMITTED ANY COMPETENT EVIDENCE TO SUPPORT THE CONTENTION THAT PETITIONER USED DRUGS OTHER THAN HEARSAY?.....	19- 21
DOES THE UNVERIFIED RESULT OF AN ON-SITE DRUG SCREEN CONSTITUTE "SOME EVIDENCE"?.....	21 - 24
CONCLUSIONS.....	24

## TABLE OF STATE AUTHORITIES

<u>Campbell v. Employment Sec Dep't.</u>	
<u>174 Wn App 210 (2013, Div 2)</u> .....	2
<u>Capeello, Restraint of</u> , 106 Wn App 576 (2001, DIv 1).....	2
<u>Cashaw, Matter of</u> , 123 Wn 2d 138 (1994).....	2, 16
<u>Citizens for Responsible Wildlife Management</u>	
<u>v. State</u> , 149 Wn 2d 622 (2003).....	1
<u>City of Redmond v. Moore</u> , 151 Wn 2d 664 (2004).....	9
<u>Clausing v. State</u> , 90 Wn App 863 (1998, Div 1).....	14-15
<u>Denny, State v.</u> , 173 Wn App 805 (2013, Div 2).....	2
<u>Downey v. Pierce County</u> , 173 Wn App 805 (2013, Div 2).....	9
<u>Golden, In re</u> , 172 Wn 2d 426 (2012).....	16
<u>Grantham, In re</u> , 168 Wn 2d 204 (2010).....	11
<u>Gruen v. Tax Commission</u> , 35 Wn 2d 1 (1949).....	5
<u>Howard, State v.</u> , 106 Wn 2d 39 (1985).....	4
<u>Howlett v. Cheetham</u> , 17 Wash. 626 (1897).....	4
<u>Jordan v. O'Brien</u> , 79 Wn 2d 406 (1971).....	17
<u>Lau v. Nelson</u> , 89 Wn 2d 772 (1978).....	3
<u>Locklear, In re</u> , 118 Wn 2d 409 (1992).....	16
<u>Long v. Labor &amp; Industries</u> , 174 Wn App 197 (012, Div 2).....	1
<u>Monohan v. Burdman</u> , 84 Wn 2d 922 (1975).....	7, 9, 10
<u>NAtions Capitol Mortgage Company v. State, Dep't of</u>	
<u>Financial Institutions</u> , 133 Wn App 723 (2006, Div 2).....	14-15

## Table of State Authorities (Cont)

<u>Nickell v. Southview Homeowners Ass'n,</u> 167 Wn App 42 (2012, Div 2).....	10
<u>Overlake Hosp Ass'n v. Dep't of Health</u> 170 Wn 2d 43 (2010)...	17
<u>Patrice v. Murphy,</u> 136 Wn 2d 845 (1998).....	3-4
<u>Pierce, In re,</u> 173 Wn 2d 372 (2011).....	14
<u>Probst v. State,</u> 167 Wn App 180 (2012, Div 2).....	11-17
<u>Reise, In re,</u> 146 Wn App 772 (2008, Div 2).....	18
<u>Scannell v. City of Seattl,</u> 97 Wn 2d 701 (1982).....	17
<u>Thomas, State v.,</u> 103 Wn App 800 (2000, Div 2).....	3-4
<u>Wash. State Legislature v. Lowry,</u> 131 Wn 2d 309 (1997).....	3-4
 <u>Statutes</u>	
<b>RCW</b> 9.95.0011	3-4
9.95.080	10
9.95.120	13-17
72.04A.090	13
 <u>Regulations</u>	
<b>WAC</b> 381-70-040.....	6 - 8
381-70-160.....	13 - 16
381-70-400.....	19
381-80-040.....	6 - 8
 <u>Rules</u>	
<b>ER</b> 702.....	20
<b>RAP</b> 16.4.....	16 - 18
16.7.....	18
16.9 .....	18

Other State Authorities

**Departmental Policy**

DOC 420.380.....22, 23, 24

**Table of Federal Authorities**

Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993)...20

Gault, In re, 387 U.S. 1 (1967)..... 9

Greenholtz v. Inmates of Nebraska Penal and Correctional

Complex, 442 U.S. 1 (1979)..... 8, 9

Morrissey v. Brewer, 408 U.S. 471 (1972)..... 6, 9

Wolff v. McDonnell, 418 U.S. 539 (1974)..... 6, 9, 11

Young v. Harper, 520 U.S. 143 (1997)..... 9

Other Federal Authorities

10 C.F.R. 26.31 Drug and alcohol Testing..... 23-24

10 C.F.R. 26. 163..... 23-24

C O U R T   O F   A P P E A L S

D I V I S I O N   I I

In re Personal Restraint	]	No. 44691-0-II
Petition of:	]	
MARK LEE MILLER,	]	PETITIONER'S REPLY TO THE
Petitioner.	]	RESPONSE OF THE DEPARTMENT
	]	OF CORRECTIONS AND THE ISRB

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I -- R E P L Y

MARK LEE MILLER, Petitioner, pro se, herein replies to the Response of the Indeterminate Sentence Review Board and the Department of Corrections.

I I -- S T A N D A R D   O F   R E V I E W

- 2.1 The Standard of review applicable to the current petition is dependent upon the issue and argument being reviewed.
- 2.2 A challenge to the constitutionality of a statute is a matter of law and is reviewed **de novo**. Citizens for Responsible Wildlife Management v. State, 149 Wn 2d 622, 631 (2003).
- 2.3 Agency rules are reviewed as if they were statutes. Long v. Labor & Industries, 174 Wn ~~2d~~ <sup>App</sup> 197, 119 (2013, Div 2).

- 2.4 The interpretation of a statute is a question of law that is reviewed **de novo**. State v. Denny, 173 Wn App 805, ¶16 (2013, Div 2).
- 2.5 Factual findings are reviewed for substantial evidence. Campbell v. Employment Security Dep't, 174 Wn App 210, ¶12 (2013, Div 2).
- 2.6 When addressing a petition from which a Petitioner has not had a previous or alternative opportunity to obtain judicial review, he need only satisfy the requirement of **RAP 16.4(c)(2)** in order to obtain relief. That is, he must demonstrate that he is under a restraint, and that the restraint is unlawful. Restraint of Capello, 106 Wn App 576 (2001, Div 1).
- 2.7 A restraint is unlawful for the purposes of **RAP 16.4** if it violates the Constitution or Laws of the United States or the State of Washington.
- 2.8 For the purposes of satisfying the requirements of **RAP 16.4**, agency rules constitute "laws of the State of Washington". (See Matter of Cashaw, 123 Wn 2d 138, 149, 866 P2d 8 (1994)).

### I I I -- A R G U M E N T

#### **IS THE ISRB AN IRREVOCABLE AND NECESSARY PART OF ESSB 6151?**

- 3.1 In a nutshell, Respondent argues:

"Repealing the sunset provision that would have eliminated the board is necessary to accomplish the purposes of the act. Without the board, the sentence structure provisions would not function. The determinate-plus sentencing scheme would be impossible to carry out. Because the challenged provision has a natural connection with one of the purposes of laws of 2001, 2nd Spec. Sess., ch 12, the act does not violate the single-subject rule." (See Respse at 33).

- 3.2 The fallacy inherent in respondent's argument is two-fold: (1) It ignores the primary purpose of the constitutional requirement (the title should most especially be sufficient to give notice to parties whose rights and liabilities are affected by the bill. Patrice v. Murphy, 136 Wn 2d 845, 854, 966 P2d 1271 (1998). In this instance, those persons most directly impacted by the repealer are those subject to the jurisdiction of the ISRB for non-sex offenses committed prior to 1 July 1984; and (2) The ISRB is not an essential element necessary to effect the determinate-plus sentencing system of ESSB 6151.
- 3.3 The legislature could have created a "Community Custody Board" entirely separate and distinct from the ISRB. The Community Custody Board did not have to be created from, nor utilize any part of, the existing ISRB.
- 3.4 Creating a new Community Custody Board - separate from the ISRB and with no affiliation with or association to the pre-SRA offenders would have been within the subject of the title of the act.
- 3.5 The legislature could have passed separate, narrow legislation that simply repealed the termination provision, **RCW 9.95.0011**. See State v. Thomas, 103 Wn App 800, 812 (2000, Div 2). Some legislative bills have consisted entirely of repealers. ID., see e.g., Lau v. Nelson, 89 Wn 2d 772, 575 P2d 719 (1978)(analyzing prospective application of laws of 1974, ch 3, "An Act Relating to motor vehicles," which consisted of three repealers).
- 3.6 Alternatively, the legislature could have included the repealer as part of more general legislation. Thomas, supra; (See, e.g., Washington



State legislature v. Lowry, 131 Wn 2d 309, 931 P2d 885 (1997) (discussing partial veto of three repealers in Laws of 1994, ch 143, "An Act Relating to milk and milk products", which included hundreds of sections, one of which contained 103 repealers); State v. Howard, 106 Wn 2d 39, 45 (1985) (holding that title "AN Act Relating to the Amendment or Repeal of statutes superseded by court rule" was sufficient to meet art. II, sec. 19 subject-in-title requirement. Thomas, supra.

- 3.7 Our legislature did none of these here. Id.
- 3.8 In the matter now presented, the title is "AN Act Relating to the Management of Sex Offenders in the Civil Commitment and Criminal Justice Systems." [See Petitioner's Appendix -E-].
- 3.9 The subject of the repealer is the resurrection of the Indeterminate Sentence Review Board which oversees all persons convicted of committing offenses prior to 1 July 1984.
- 3.10 The title of the Act specifically carves out the management of sex offenders as the subject of the legislation.
- 3.11 The title of the act does not signal a reader of the hidden effect of the amendment's enactment. THomas, 103 Wn App at 809, citing Patrice v. Murphy, 136 Wn 2d at 855. That hidden effect is to resurrect the ISRB from the legislative abyss mandated by **RCW 9.95.0011** [Laws of 1997] to resume its sovereignty over the entire Pre-SRA offender population -- without regard to the underlying offense of conviction.
- 3.12 If the subject of a statute is to repeal another statute, then manifestly that subject must be fairly expressed in the title. Howlett v. Cheetham, 17 Wash. 626, 634, 50 P. 522 (1897).

- 3.13 It is paramount to our constitutional requirement that, without exception, when act cover or include several definite objectives, those objectives must be mentioned in the title of the act. (See Gruen v. Tax Commission, 35 Wn 2d 1, 15, 211 P2d 651 (1949)).
- 3.14 Just because the part of the bill relating to the management of sex offenders in the criminal justice system requires a "community custody board", does not, by itself, apprise even the most astute reader that part of the act will prevent the pre-SRA parole board from passing forever into history.
- 3.15 This Court should especially note that **section 101** of the Act (Statement of Legislative Intent) provides no indicia of the Acts impact on pre-SRA offenders:
- 3.16 "The legislature intends the following omnibus bill to address the management of sex offenders in the civil commitment and criminal justice systems for the purpose of public health, safety, and welfare. Provisions address siting of and continued operation of facilities for persons civilly committed under 71.09 RCW and sentencing of persons who have committed sex offenses. Other provisions address the need for sex offender treatment providers with specific credentials. Additional provisions address the continued operation or expansion of criminal justice facilities at McNeal Island, because these facilities are impacted by the civil facilities on McNeal Island for persons civilly committed under chapter 71.09 RCW".
- 3.17 No where within the four-corners of this statement of legislative intent can be found the least inkling that hidden within the realms of this Act is a provision designed to continue the life and jurisdiction of the Indeterminate Sentence Review Board over pre-SRA offenders--or at all.

- 3.18 DOES A PAROLEE HAVE A RIGHT TO NOTICE AND SOME FORM OF HEARING BEFORE BEING SANCTIONED WITH THE REVOCATION OF HIS CDFS BASED UPON ALLEGATIONS THAT HE VIOLATED CONDITIONS OF PAROLE?

ARGUMENT

- 3.19 "The touchstone of due process is protection of the individual against arbitrary action of the government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974).
- 3.20 In the matter now presented, Respondent argues that due process rights only inhere when "an individual would be condemned to suffer a grievous loss." (Response at 33). Respondent further claims that "[a]dding the condition to report to his CCO is a modification of parole. A modification of parole does not amount to a grievous loss that triggers the minimal due process protections of Morrissey. . . ." (Response, supra).
- 3.21 However, respondent's premise is flawed, and neither the authorities cited nor the conclusions reached are quite on point with the record being presented by the Department.
- 3.22 Respondent is correct in its claim that Petitioner was still on parole. Nonetheless, Respondent overlooks the specific type of parole, and the rights inherent in that particular form:
- 3.23 "Conditional discharge from supervision is defined as that state of parole where a parolee is no longer required to report to an officer of the department of corrections but is required to observe all laws and make an annual report to the board. Civil rights lost at the time of conviction are not restored." **WAC 381-80-040**. See also Respondent's Exhibit #39, Conditional Discharge from Supervision.
- 3.24 Petitioner was paroled to a "Conditional Discharge From Supervision" [CDFS]. The conditions specified in all documents supporting the CDFS provide as follows:

- 3.25 "ANY **criminal conviction** in the intervening months until he is eligible for a final discharge may trigger another board revocation hearing." (See Respondent's Exhibits #22 at page 5, and #23 at page 5)(My emphasis).
- 3.26 The record before this court is clear and incontrovertible - at no time leading up to the actions of either the Department or the Board did the Petitioner violate this mandate (See Respondent's Exhibit #27 - Board Special; see also Respondent's Exhibit #28, Administrative decision sheet).
- 3.27 The restrictions, limitations, and conditions attached to the usual parole status constitute a form of custody. See Monohan v. Burdman, 84 Wn 2d 922, 925 (1975). This is so because the parolee, unlike the ordinary citizen is subject to supervision by his parole officer, limited in his mode, manner, and place of living and travel, restricted as to his associates and type of employment, and subject to reincarceration in the event of a breach of any conditions of parole. Thus, he is not a free man in the commonly accepted sense. Monohan, 84 Wn 2d at 925.
- 3.28 Petitioner, on the other hand, was neither subject to supervision, nor restricted in his mode, manner or place of living and travel. He was free to roam about the State so long as he fulfilled two (2) imposed obligations:
- (1) File an annual report with the board (Appendix -F-, exhibit #1); and,
  - (2) Obey all laws (See Respondent's Exhibit #39--CDFFS)
- 3.29 Therefore, the revocation of the CDFS (based upon allegations of misconduct) and return to active supervision did, in fact, constitute a "grievous loss" and significant hardship and restraint of his personal liberty and freedoms.

- 3.30 The differences between an initial grant of parole and the revocation of the conditional liberty of the parolee are well recognized. Greenholtz v. Inmates of Nebraska Penal & Correcitonal Complex, 442 U.S. 1, 10 (1979).
- 3.31 The Greenholtz court pointed out tht the first step in **any** revocation decision is a wholly retorspective factual question:
- 1) Did the parolee, in fact, violate one or~~a~~ more conditions of his parole?
- 3.32 Only after the board has considered and answered this question, can it be determined if there is reason or need to ask the second question:
- 2) What, if any, sanction is appropriate based upon the conduct alleged?
- 3.33 Under the facts presented by the Board and the Department's own record, Petitioner had two conditions ~~to~~ his parole relevant to this court's review:
- 1) Write the board an annual report informing them of his whereabouts and income; (See Appendix -F-, Ex#1); and
  - 2) Obey all laws. See respondent's Exhibit #39.
- 3.34 Absent a criminal conviction, it can neither be alleged nor established that petitioner failed to abide by a condition of his parole. (See Respondent's Exhibit #39, and **WAC 381-80-040**).
- 3.35 In the present matter, it should be determinative that petitioner has been acquitted of wrongdoing in every criminal matter that has proceeded to court.
- 3.36 Part of the function of the notice requirement is to give the charged party a chance to marshal the facts in his defense and to clarify what

the charges are, in fact. Wolff, 418 U.S. at 564, citing In re Gault, 387 U.S. 1, 33-34, and n. 54 (1967).

- 3.37 The requirement for some kind of hearing applies to the taking of private property. Downey v. Pierce County, 165 Wn App 152, 165 at ¶ 20 (2011, Div 2); The revocation of licenses, Wolff, 418 U.S. 565, see also City of Redmond v. Moore, 151 Wn 2d 664, 670 (2004); The operation of state-dispute-settlement mechanisms, when one person seeks to take property from another. Wolff, 418 U.S. at 558.
- 3.38 A person's liberty is equally protected, even when that liberty is a statutory creation of the state. Wolff, supra.
- 3.39 The point of the entire line of cases starting with Morrissey v. Brewer, and running through Wolff v. McDonnell, Monohan v. Burman, Greenholtz v. Inmates..., and Young v. Harper, 520 U.S. 143 (1997), is that the State is free to grant and define privileges such as parole, probation, good-time credits, conditional discharges, and other conditional liberties, freedoms, and privileges -- or not at all. Clearly, all of these matters lay within the purview of discretion granted to a sovereign to create or not create.
- 3.40 However, once created and conferred upon an individual, a person's interest in that liberty becomes manifest and vested, and its deprivation may not occur without that due process of law required under both the state and federal constitutions. (See all of the foregoing citations).
- 3.41 Our legislature has itself determined that the board may revoke **any** order or decision previously made or granted--PROVIDED that it holds a hearing

first, after notice of the allegations have been served, and providing the person an opportunity to present evidence and testimony. (See **RCW 9.95.080**).

3.42 Our Supreme court has consistently held that some form of hearing is required before the Board may impose a sanction that alters a fundamental aspect of a sentence. See Monohan, supra.

3.43 Finally, Petitioner believes that this court should hold that both the Department and the ISRB are equitably estopped from arguing here that the requested action was simply a modification of the conditions of supervision, and not a punitive revocation of the Conditional Discharge certificate.

3.44 The doctrine of equitable estoppel rests on the principle that a person "shall not be permitted to deny what he has once solemnly acknowledged." Nickell v. Southview Homeowners Ass'n, 167 Wn App 42, 53, ¶ 18 (2012, Div 2).

3.45 Respondent's Exhibit #27, incontrovertibly states:

"The purpose of this report is to notify the Board of Mr. Miller's alleged criminal activities in the community since he was granted a Conditional Discharge from Supervision and to request that his Conditional Discharge **be revoked** and he be placed back on Active Supervision." (My emphasis).

3.46 Three facts should be clear and apparent on the face of this request:

(1) It accuses Petitioner of violating conditions of his parole;

(2) It requests the board to **revoke** Petitioner's Conditional Discharge From Supervision as a sanction based upon those allegations;

(3) It is plainly obvious that Petitioner was denied notice of its contents, ~~to~~ his clear detriment.

3.47 "disciplinary decisions will be reversed upon a showing that it was so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding, so as to work to the offenders prejudice." In re Grantham, 168 Wn 2d 204, 215, ¶ 13 (2010).

3.48 The essence of this fundamental fairness has long been held to be informed of the charges against him, and to be provided a meaningful opportunity to present evidence, as well as the right to receive a written statement of the evidence relied upon and the reason for the disciplinary action. Grantham, 168 Wn 2d at 218, ¶ 17. See also Wolff, 418 U.S. at 566, stating that "the right to present evidence is basic to a fair hearing."

3.49 The Wolff court stated it best:

"Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." 418 U.S. at 558.

3.50 Likewise, since Petitioner's CDFS can only be revoked upon a showing that he violated a condition of parole (e.g., that he failed to obey all laws) minimal requirements of procedural due process must at least be adhered to.

3.51 An agency's decision is arbitrary and capricious if it results from willful and unreasoning disregard of the facts and circumstances. Probst v. State Dep't of Retirement Systems, 167 Wn App 180, 191, ¶ 25 (2012, Div2).



3.52 It is incontrovertible that Petitioner has not violated any condition of his CDFS. Petitioner has not been convicted of any criminal offense. The board's revocation of Petitioner's CDFS is taken without regard to these facts or circumstances. The Board's revocation of Petitioner's CDFS is arbitrary and capricious, and denies Petitioner the fundamental fairness required by our laws and constitution.

3.53                   **IS THE DEPARTMENT AUTHORIZED TO REQUEST THE ISRB  
TO REVOKE THE CDFS OF A PAROLEE NOT BEING SUPER-  
VISED BY THE DEPARTMENT?**

3.54 Respondent misconstrues Petitioner's third claim, asserting that the petition argues "DOC had no authority to recommend rescission of his conditional discharge from supervision because the DOC was not supervising him at the time." (See Response at 36).

3.55 "Petitioner does not argue that the ISRB cannot alter, amend, or modify release conditions. Nor does Petitioner argue that the Department can never request modification of a parolee's release conditions. Petitioner argues that the Department's requests to the ISRB must be in accord with statutes and regulations that authorize the request and provide procedural protections to the rights of the parolee." (See Petition, at 3.8).

3.56 Respondent's flawed premise begins with its conclusory allegation that "Miller had conditions of parole at that time..., And Miller violated those conditions."

3.57 As argued supra, Petitioner had two relevant conditions of parole: (1) File an annual report, and (2) Obey all laws. Under the terms of his parole, absent a conviction for a criminal offense, the Department cannot

allege a violation of these conditions. Thus, the Department cannot make recommendation to the Board regarding craved modifications to those conditions.

3.58 Moreover, assuming for the sake of argument that a foundational basis for the allegations existed in the first place -- the relevant statutes and regulations of the ISRB require notice of the allegations be served upon the parolee, and that he be provided a hearing. (See **RCW 9.95.120**, **RCW 72.04A.090**, and **WAC 381-70-160**)

3.59 **RCW 9.95.120** -- paragraph 4 -- provides in relevant part:

"Whenever a paroled prisoner is **accused of a violation of** his or her parole, other than commission of, and conviction for, a felony or misdemeanor under the laws of this State or the laws of any state where he or she may then be, he or she **shall be entitled** to a fair and impartial hearing of such charges within thirty days from the time that he or she is served with charges of the violations of conditions of parole after his or her arrest and detention". (My emphasis)

3.60 These provisions do further provide that the facts and circumstances surrounding the allegations of misconduct of the parolee shall be reported to the board by the probation and parole officer with recommendations (See **RCW 72.04A.090**). But all of these statutes and regulations envisage a clear and unambiguous picture of legislative intent:

- 3.61 (1) If a community Corrections Officer believes a parolee has breached one or more conditions of parole, or violates any law of the State of Washington, or rules of the Board, the officer may arrest, or cause the arrest of the parolee.
- 3.62 (2) The officer is then required to report the allegations to the board--with recommendation--and serve the parolee with the violations specified.

- 3.63 (3) The parolee is then entitled to a fair and impartial hearing within thirty days if the board does not reinstate him to the same or modified conditions after providing the parolee with an administrative review hearing.
- 3.64 In any question of statutory construction the court looks to ascertain the legislature's intention by first examining the statute's plain meaning. In re Pierce, 173 Wn 2d 372, 377-78, ¶ 18 (2011). We discern a statute's plain meaning from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. (Ibid). Statutes must be interpreted and construed so that all of the language used is given effect, with no portion rendered meaningless or superfluous. Id. (Internal citations omitted).
- 3.65 Petitioner feels it is important to present the conversations between the Department officers and the ISRB leading up to the request and the Board's action (See Appendix -F-, Exhibit #2 -- e-mail conversations). The conversations will speak for themselves. However, it should be apparent to this court that the discussions went from "lawful" process ("It's your call if you want to suspend him or not") to "unlawful" process ("Another option is to write a report to the Board & ask that his CDFS be nullified & that he be placed back on active supervision due to the misdemeanor behavior and the request by local law enforcement. Could you forward their e-mail also.").
- 3.66 Under the appearance of fairness doctrine both the Department and the Board denied Petitioner fundamentally fair treatment--and the appearance of fairness. See Nations Capitol Mortgage Corp. v. State Dep't of Financial Institutions, 133 Wn App 723 (2006, Div 2).

- 3.67 "Under the appearance of fairness doctrine it is not necessary to show that a decision maker's bias actually affected the outcome, only that it could have. But in the context of administrative proceedings, the appearance of fairness doctrine exists in tension with the presumption that public officials will properly perform their duties. Nations Capitol, 133 Wn App at 759, ¶ 101.
- 3.68 TO overcome the presumption, a party invoking the appearance of fairness doctrine must come forth with evidence of actual or potential bias. Ibid at ¶ 102.
- 3.69 Aside from the e-mail conversations (Appendix -F-, Exhibit #2) and the Board Special requesting Petitioner's CDFS be revoked (Respondent's Exhibit #27) Nothing is more telling than the administrative decision sheet revoking Petitioner's CDFS:
- 3.70       1) Only two of the five board members participated in the decision to revoke Petitioner's CDFS: Lynne DeLano and Thomas Sahlberg;
- 3.71       2) The Administrative Decision's reasons specifically mandate:
- "The next action will likely be to schedule an on-site violation hearing. When a violation report is submitted by Mr. Miller's CCO, it must include evidence to be presented by witnesses (including law enforcement) of alleged criminal activity regardless of the outcome of local prosecution. Other alleged violations will be considered as well."
- (Respondent's Exhibit #28).
- 3.72 Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. Clausing v. State, 90 Wn App 863, 874 (1998, Div 1).

3.73 The record before this court, and presented by respondent in support of its own actions, is full and replete with evidence of administrative bias that denied Petitioner the fundamentally fair proceedings to which any person is entitled <sup>under</sup> ~~under~~ the laws and constitution of the State of Washington, and these United States.

3.74 **DOES THE FAILURE OF THE BOARD TO HOLD PETITIONER'S  
HEARING WITHIN THIRTY DAYS VIOLATE THE LAWS OF THE  
STATE OF WASHINGTON?**

ARGUMENT

3.75 In order to obtain relief by way of a personal restraint petition, a Petitioner must "state facts on which he or she bases his or her claim of unlawful restraint, and the evidence supporting the allegations. **In re Golden**, 172 Wn 2d 426, 430, ¶ 16 (2012).

3.76 A restraint is unlawful if it violates the laws of the State of Washington. RAP 16.4.

3.77 For the purposes of **RAP 16.4(c)(2)** administrative regulations of the ISRB constitute "laws of the State of Washington". (See In re Cashaw, 123 Wn 2d 138, 149 (1994); also In re Locklear, 118 Wn 2d 409 (1992).

3.78 **WAC 381-70-160** "Rights and privileges relating to revocation hearings" provides in relevant part:

3.79 (1) An alleged parole violator **shall be entitled to a fair and impartial hearing** of the charges of the parole violation **within thirty days** of service of suspension in the state of Washington, reasonably near the site of the alleged violation(s). (My emphasis).

- 3.80 Rules of statutory construction apply to administrative rules and regulations. Overlake Hosp. Ass'n v. Department of Health, 170 Wn 2d 43, 51-52, ¶ 11 (2010). If the meaning of a rule is plain and unambiguous on its face, then we are to give effect to that plain meaning. *Id.*
- 3.81 It is beyond question that use of the word "shall" by an agency indicates a mandatory obligation. Scannell v. City of Seattle, 97 Wn 2d 701 (1982). When an individual's rights depend upon giving the word "shall" an imperative construction, "shall" is presumed to have been used in reference to that right or benefit and it receives a mandatory interpretation. Scannell, 97 Wn 2d at 706, citing Jordan v. O'Brien, 79 Wn 2d 406, 410 (1971).
- 3.82 Moreover, as stated in the argument presented on the previous issue, **RCW 9.95.120** contains parallel language at paragraph four(4). The interpretation of a statute is a question of law that is reviewed de novo. **Probst v. State Dep't of Retirement systems**, 167 Wn App 180, 186, ¶ 10 (2012, Div 2). We give effect to a statute's plain meaning as an expression of legislative intent. *Id.*, at ¶ 11.
- 3.83 Respondent argues that Petitioner was being held on other matters, and so the thirty day period did not apply. However, Respondent misrepresents both the facts, and the issue. Petitioner was arrested on the board order on 26 October 2012. This is uncontested.
- 3.84 Petitioner was subsequently charged and pr'ed on additional counts of resisting arrest, and PSP 2 (which was later dismissed).
- 3.85 Petitioner was being held solely on the order of the board, and even excluding that fact from the equation, the board never attempted to

to schedule Petitioner for a hearing within thirty days of the date he was actually released from custody on the other charges; within thirty days of the date the board learned he was being held exclusively on the warrant of the board; or within thirty days of the date that he was conditionally released by the board on the 7th of December.

3.86 In the end, this court should find determinative to this issue, that even after the board released Petitioner, it neither scheduled the hearing within thirty days of release, nor scheduled the hearing for a date subsequent to the resolution of the felony charges. Thus, neither claim asserted by the board as justification for the delay holds water, and this court should vacate and dismiss allegations one, two, and three.

3.87 **HAS RESPONDENT OFFERED ANY EVIDENCE OR ARGUMENT  
TO CONTRAVENE PETITIONER'S CLAIM THAT THE DEPARTMENT  
DID NOT HAVE LEGAL AUTHORITY TO OBTAIN A URINE  
SPECIMENT FROM HIM ON 27 DECEMBER 2012?**

3.88 **RAP 16.7** requires a Petitioner to state with particularity facts which, if proven, would entitle him to relief." In re Reise, 146 Wn App 772, 780, ¶ 8 (2008, Div 2), citing **RAP 16.7 (a)(2)(i)**.

3.89 The State must respond to a properly supported petition with its own competent evidence. Reise, supra, citing **RAP 16.9**.

3.90 In the matter now presented, Petitioner submitted as Appendix -A-, Exhibit #2, "Order of Parole Conditions", which provides the condition now in question. Respondent provided no argument or authority to counter or oppose the well-reasoned and supported argument of Petitioner. This court should grant Petitioner his requested relief.

3.91

HAS RESPONDENT SUBMITTED ANY  
COMPETENT EVIDENCE TO SUPPORT  
THE CONTENTION THAT PETITIONER  
USED DRUGS OTHER THAN HEARSAY?

3.92 In Petitioner's Sixth ground for relief, it is pointed out that **WAC 381-70-400** requires a claimed violation to be dismissed if it is founded solely on hearsay that would not be admissssible in a Superior Court. See Petition, Appendix -C-.

3.93 "Hearsay" is defined by Black's Law dictionary (9th edition) as:

1. Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. \*Such testimony is generally inadmissible under the rules of evidence. 2. In federal law, a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). -- Also termed hearsay evidence; second hand evidence.

3.94 Presently, the Respondent argues that "**WAC 381-70-400** does not require a urinalysis done by a CCO to be corroborated by outside testing." And this is correct. However, the rules of evidence still require that when a parolee is accused of violating a condition of parole, "the board **shall not** enter a finding of guilt" if the sole evidence to support the allegation is hearsay that would not be admissible in a superior court proceeding.

3.95 Respondent further argues that "[t]he CCO who took the urine sample and did the testing was at the revocation hearing and testified. Firsthand knowledge does not constitute hearsay." (See Response at 46)



- 3.96 Firsthand knowledge does not constitute hearsay. But this begs the question as to what constitutes "firsthand knowledge"?
- 3.97 As clearly and cogently argued in the petition, the Respondent's premise contains several flaws of reasoning: (1) The result of the on-site drug screen has been contested from the outset; (2) Neither the specimen nor the testing unit were maintained in evidence or admitted at the hearing; and (3) The CCO has no special knowledge, expertise, or training with regard to the accuracy of the testing procedures utilized; (4) The CCO cannot testify to "what he knows" (whether or not Petitioner used illegal drugs) only what he "perceives to have been told" [by the testing unit].
- 3.98 **ER 702** provides that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise".
- 3.99 The CCO is not an expert, and thus has no special knowledge that will aid the Member hearing the allegation in determining if the testing unit is accurate, whether the specimen was compromised, or the margin for error that may be present.
- 3.100 The subject of an expert's testimony must be "scientific...knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579, 590 (1993). Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. *Id.*

- 3.101 As both the testing unit and the specimen tested were destroyed - prior to the hearing - at the direction of Petitioner's CCO, there exists nothing in the record to support the conclusory allegations of the Department except the bald assertions of the CCO.
- 3.102 There exists no quantitative analysis or assessment for this court to review (See Appendix -F-, Exhibits #5 and #7, quantitative analysis of urine specimens submitted in 2006 for testing by Sterling Laboratories).
- 3.103 There is no "chain of custody log" or "consent for testing form" for this Court to review and assess. (Appendix-F- exhibits #6 and #8)
- 3.104 There is no record to support the Department's claim that Petitioner tested positive for any substance. In fact, there is no reviewable record to establish that Petitioner gave a urine specimen to submit for drug screening, other than a statement by Petitioner's CCO.
- 3.105 As the testimony of the Department is not based upon facts which they know and have personal knowledge of its truth and validity -- but rather, is founded upon subjective belief and unsupported speculation -- the conclusory allegations constitute nothing more than inadmissible hearsay.
- 3.106 Pursuant to **WAC 381-70-400**, the Board was required to enter a finding of not guilty to these allegations. Any other result is a violation of the Board's own rules. Pursuant to **RAP 16.4(c)(2)** Petitioner's restraint is in violation of the law of the State of Washington.

- 3.107 **DOES THE UNVERIFIED RESULT OF AN ON-SITE  
DRUG SCREEN CONSTITUTE "SOME EVIDENCE"?**

ARGUMENT

- 3.108 Respondent hangs its entire premise upon a singular claim:
- 3.109 1) Miller cites no studies or case law indicating in-house urinalyses [sic] are incorrect more often than not.
- 3.110 First, Respondent ignores the fact Petitioner has contested the Department's claim that the test exhibited a positive result from the outset. The only evidence in the record that the test gave a positive indication is the bald assertion of the CCO. A CCO with a history of claiming that an on-site test provided a positive result that confirmatory retesting reversed. (Appendix -F-, Exhibits #3, page 1, VR dismissed 01-19-2006; exhibits #5, and #7).
- 3.111 Secondly, Petitioner's own personal record with **DOC 420.380** establishes the inaccuracy of in-house testing procedures. The Board notice of violation [Appendix -F-, Ex #3] lists "PREVIOUS ACTION": 01-12-06 VR [violation report] submitted. On 01-19-06 Violation was dismissed and parole reinstated when confirmatory retesting established Petitioner<sup>1</sup> did not use drugs.
- 3.112 The violation report submitted on 01-12-06 was based upon an in-house drug test result that CCO Nielsen assertedly maintained was positive. The violation was dismissed on the 19th after confirmatory retesting established the specimen was negative for all substances.
- 3.113 The National Institute on Drug Abuse (NIDA) has established and adopted specific standards and required criteria for all alcohol and drug testing that have been universally adopted across the nation [See **10 C.F.R. §§ 26.31 and 26.163(a)(1), 26.163(b)(1)**]. Up until 2012, even the

Washington State Department of Corrections abided by these Standards and testing requirements [See Appendix -G- **DOC 420.380**, page 8, § IX(c)(1)].

- 3.114 10 CFR 26.163(2) provides that "Each confirmatory drug test must provide a quantiative result...." And § (1) provides that the quantitative result for amphetamine class compounds is 500 ng/ml. Please compare this with the same quantitative amount contained for the same substance in DOC 420.380 [Appendix -G-]. [ See also Appendix -F-, Exhibit #11]
- 3.115 However, DOC 420.380 [in effect in 2012] has no confirmatory cut-off levels, because confirmatory retesting is only performed to establish whether a specimen has been tampered with by the offender -- not staff. [See Appendix -H-, § VIII (d)].
- 3.116 The importance of confirmatory retesting and the NIDA standard cut-off levels should be apparent from the records contained in Appendix -F-, and designated as exhibits #3, #4, #5, and #7.
- 3.117 These are true and correct copies of actual records of Petitioner's specimens that have been tested over time. Exhibit #5 indicates a metabolite concentration of 149 ng/ml. Exhibit #7 indicates metabolite concentrations of 207 ng/ml and 187 ng/ml. Each of these results are far below the required cut-off level off the NIDA standards, or the previously applicable DOC 420.380. Yet each of these specimens were submitted for the confirmatory retesting because an on-site test yielded a positive result.
- 3.118 The on-site drug testing procedure used at the time of Petitioner's arrest lacks uniform checks and balances to assure conformity as to method or to verify the accuracy of the process. There is no set of facts that

can be presented to this court to verify the accuracy or calibration of the testing unit at the time it was used, there is nothing that the Department can present to this court to establish the error rate on average, or for the specific unit used, and the Department destroyed both the specimen and the unit prior to Petitioner's hearing. Thus, there is no evidence for this court to review.

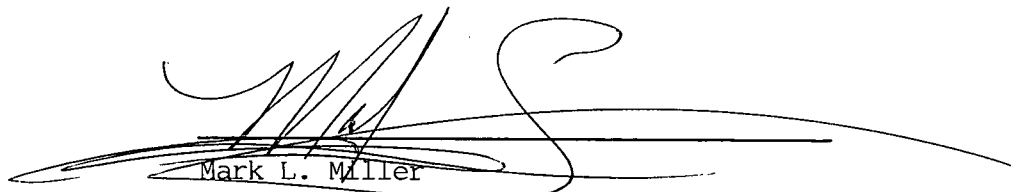
3.119 DOC 420.380 (as applied to these facts and Petitioner) violates fundamental constitutional provisions of fairness. It is arbitrary and capricious in itself, and as applied to petitioner. It only allows confirmatory retesting when it is suspected that the offender tampered with the specimen, and never to challenge the accuracy of the on-site unit.

3.120 This court can rule DOC 420.380 is invalid as applied based on any of the foregoing deficiencies.

#### I V -- C O N C L U S I O N S

Based upon the foregoing facts and argument, and the record and file being presented by Petitioner and Respondent, Petitioner asks this court to grant all of the relief requested in the Personal Restraint Petition.

Date: 7 August 2013

  
Mark L. Miller  
Petitioner, pro se

# A P P E N D I X      —F—

Exhibit #	Document Description	pages
1	Yearly report	2-pages
2	E-mails 9 DEltember 2011	2-pages
3	Board Notice of Violation	2-pages
4	Declaration of MLM 2005[7]	4-pages
5	Sterling Gc/MC test results	1-page
6	Consent for Testing	1-page
7	Sterling GC/MS test results	1-page
8	Consent for testing	1-page
9	Grievance DOC 420.380	1-page
10	Grievance DOC 420.380 Level II	1-Page
11	10 C.F.R. § 26.163	3-pages

IN THE COURT OF APPEALS OF WASHINGTON

DIVISION II

In re Personal Restraint	]	No. 44691-0-II
	]	
Petition of:	]	DECLARATION OF
	]	
MARK LEE MILLER,	]	MARK LEE MILLER
	]	
Petitioner.	]	

---

I, Mark Lee Miller, declare the following to be true and correct:

1. I am the petitioner in the above-entitled action.
2. The following described documents are true and correct copies of documents in my possession, and copies of records provided to myself by either the Department of Correction public disclosure unit [request number PDU 24869], or the Indeterminate Sentence Review Board.
3. Those record that were provided to me by the department in response to the records request have printed at the bottom of each page the PDU tracking number [24869] and a page number corresponding to the document page in regards to its placement within the entire records request.
4. Exhibit #1 is a copy of the e-mail I sent to the ISRB on 28 May 2011, at 5:19 P.M., which consisted of the yearly report required by **WAC 381-80-040** and condition 1 of my CDFS.

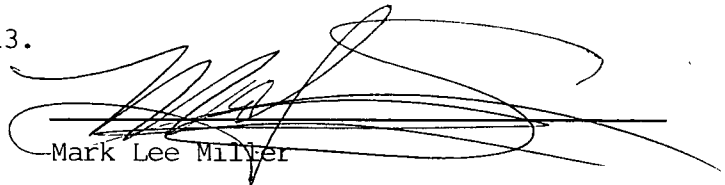
APPENDIX #  
F

5. Exhibit #2 consists of true and correct copies of e-mail correspondence between Brenda Duggan, Cathy LeCompte, Ronda Nielsen, and Jodery Goble (all of the Department of Corrections) and Richard P. LaRosa (of the ISRE) discussing how to revoke my discharge and return me to active supervision.
6. Exhibit #3 is a true and correct copy of a board notice of violation dated 9 March 2006.
7. Exhibit #4 is a true and correct copy of the "Declaration of Mark Lee Miller" which I submitted to the Department of Corrections in support of my discrimination complaint which I filed in 2007. The year that appears in the signature (2005) is a scrivener's error.
8. Exhibit #5 is a true and correct copy of a Sterling Reference laboratories confirmatory testing result using GC/MS for a specimen submitted in February 2006 and having specimen ID# 7528037.
9. Exhibit #6 is a true and correct copy of the consent for testing signed by myself in regards to Specimen ID# 7528037.
10. Exhibit #7 is a true and correct copy of a Sterling Reference Laboratories confirmatory testing result using GC/MS for a specimen submitted on 28 February 2006: Specimen ID# 7528015.
11. Exhibit #8 is a true and correct copy of the consent for testing signed by myself on 28 February 2006 for specimen ID# 7528015.



12. Exhibit #9 is a true and correct copy of the initial grievance that I filed with the Department of Corrections in which I challenge the deficiencies of **DOC 420.380** [drug testing policy] together with the Department's response.
13. Appendix -G- item #9, is a true and correct copy of **DOC 420.380** as in effect in December 2011.
14. Appendix -H- item 10 is a true and correct copy of **DOC 420.380** as in effect in December 2012.

Done under penalty of perjury under the laws of the State of Washington  
on this 12th Day of August, 2013.

  
Mark Lee Miller  
Declarant

**Garland, Shannon M. 'ISRB' (DOC)**

---

**From:** LaRosa, Richard P. 'ISRB' (DOC)  
**Sent:** Tuesday, May 31, 2011 10:31 AM  
**To:** Garland, Shannon M. 'ISRB' (DOC)  
**Subject:** FW: Mark L. Miller, DOC# 265210

File in community sup section.

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**From:** ISRB  
**Sent:** Tuesday, May 31, 2011 10:06 AM  
**To:** LaRosa, Richard P. 'ISRB' (DOC)  
**Cc:** Seifert, Irene L. 'ISRB' (DOC)  
**Subject:** FW: Mark L. Miller, DOC# 265210

Richard,

This came in the ISRB mailbox. It is an email from Mark Miller.

Melissa

---

**From:** Mark Miller [<mailto:markleemiller61@yahoo.com>]  
**Sent:** Saturday, May 28, 2011 5:19 PM  
**To:** ISRB  
**Subject:** Mark L. Miller, DOC# 265210

Dear Board members:

I am currently residing in the city of Goldendale, County of Klickitat, State of Washington.

My income for the year 2010 was limited to just over eight-thousand dollars, primarily by the five-and-one-half months I spent in the Klickitat County Jail defending myself against the assault charges that arose out of an incident where I was attacked by two men while I slept.

I worked from February of this year until April of this year for a second-hand store here in town; however, I was laid-off after my car broke down in Vancouver, and I was unable to return to work on time.

I am currently unemployed.

The Cowlitz Indian Tribe is currently paying my rent and utility bill, and is also assisting me with food and other necessities.

My home was recently broken into by unidentified persons. The local police offer me little, if any, assistance in my complaints.

I was recently cited for disorderly conduct, a charge that I am proceeding "Pro se" against, and expect to have dismissed within the next sixty (60) days. The charge arose from an incident where a drunken female (Jaqueline something-or-other) attacked me. I was cited, booked, and released.

I was completely sober, had not had anything to drink. I volunteered to take a breathalyzer for the responding officers. My offer was, however, declined.

My phone numbers are as follows:

509-250-3658 Cell;  
360-635-1135 Message (Angel Walkameyer, sister)

My physical address is:

514 S. Washington  
Goldendale WA 98620

My mailing address is:

PO Box 345  
Goldendale WA 98620

My e-mail address is:

[markleemiller61@yahoo.com](mailto:markleemiller61@yahoo.com)

If you have any further questions, please feel free to contact me via any of the above methods.

Sincerely,

Mark L. Miller  
265210

**Seifert, Irene L. (DOC)**

---

**From:** LaRosa, Richard P. (DOC)  
**Sent:** Friday, December 09, 2011 9:55 AM  
**To:** Seifert, Irene L. (DOC)  
**Subject:** FW: MILLER, Mark #265210

File in comm. sup section

-----Original Message-----

**From:** LaRosa, Richard P. (DOC)  
**Sent:** Friday, December 09, 2011 9:52 AM  
**To:** Duggan, Brenda J. (DOC)  
**Cc:** LeCompte, Cathy (DOC); Nielsen, Ronda L. (DOC); Goble, Jodery A. (DOC)  
**Subject:** RE: MILLER, Mark #265210

Another option is to write a report to the Board & ask that his CDFS be nullified & that he be placed back on active supervision due to the misdemeanor behavior & request by local law enforcement. Could you forward their e-mail also?

-----Original Message-----

**From:** Duggan, Brenda J. (DOC)  
**Sent:** Friday, December 09, 2011 9:44 AM  
**To:** LaRosa, Richard P. (DOC)  
**Cc:** LeCompte, Cathy (DOC); Nielsen, Ronda L. (DOC); Goble, Jodery A. (DOC)  
**Subject:** RE: MILLER, Mark #265210

I will let Ronda, Jodery and Cathy discuss then and they will get back to you.

Brenda J. Duggan  
Secretary Senior  
Goldendale Field Office  
228 S. Columbus, Suite 103  
Goldendale, WA 98620  
509-773-3708  
509-773-5230 Fax

Always remember... "Wet sheep don't shrink. They shake off the water."

-----Original Message-----

**From:** LaRosa, Richard P. (DOC)  
**Sent:** Friday, December 09, 2011 9:42 AM  
**To:** Duggan, Brenda J. (DOC)  
**Cc:** LeCompte, Cathy (DOC); Nielsen, Ronda L. (DOC); Goble, Jodery A. (DOC)  
**Subject:** RE: MILLER, Mark #265210

I see 5 arrests this year, including last night, & 1 is a traffic citation. No felony arrests. Can't tell if there have been any convictions. He's a nuisance offender. It's your call if you want to suspend him or not but I'm not sure there's enough there to return him to

prison, which means he would be back in your office under supervision. Did that change his behavior last time around? Your call.

-----Original Message-----

From: Duggan, Brenda J. (DOC)  
Sent: Friday, December 09, 2011 9:29 AM  
To: LaRosa, Richard P. (DOC)  
Cc: LeCompte, Cathy (DOC); Nielsen, Ronda L. (DOC); Goble, Jodery A. (DOC)  
Subject: MILLER, Mark #265210

Rich,

Mr. Miller was booked into the Klickitat County Jail last night on new Klickitat County East District Court Charges of Unlawful Harboring of a Minor, CR0004650. The phone call last night to CCO Nielsen and subsequent e-mail stated P's relative Cheyenne Miller ran from CPS's custody to Mr. Miller's house and when law enforcement arrived he stated that she wasn't there and wouldn't let them in. When they gained entry to the house they found her hiding upstairs.

In the e-mail local law enforcement knows that P is on conditional discharge from supervision and has requested the parole board to take action on P as they have arrested him 7 times in 2011.

CR0004650 12/08/11 Unlawful Harboring of a Minor should be arraigned today.  
CR0004604 08/06/11 Criminal Trespass 1st, Disorderly Conduct - Next court dated 02/07/12  
11-1-00088-7 04/17/11 Burg 2nd and Theft 3rd - Status Conference 12/19 and Jury Trial 01/19

Brenda

Brenda J. Duggan  
Secretary Senior  
Goldendale Field Office  
228 S. Columbus, Suite 103  
Goldendale, WA 98620  
509-773-3708  
509-773-5230 Fax

Always remember... "Wet sheep don't shrink. They shake off the water."

APPENDIX #*f*  
EXHIBIT #*2*



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

BOARD-NOTICE OF VIOLATION

REPORT TO: Indeterminate Sentence Review Board

DATE: 3/9/06  
DOC NUMBER: 265210

OFFENDER NAME: MILLER, Mark Lee  
AKA: Cochise, Karate Kid  
CRIME: Robbery 1<sup>st</sup> Degree  
SENTENCE: 40 years

DOB: 12/10/61  
Clark COUNTY CAUSE #: 79-1-00126-1  
DATE OF PAROLE: 7/20/05

Last Known Address: 1045 Knotty Pine Road  
Goldendale WA 98620

TERMINATION DATE: 12/13/2030

MAILING ADDRESS:

STATUS: Active  
CLASSIFICATION: RMA

**PREVIOUS ACTION:**

1/12/06 - VR submitted.  
1/19/06 - Violation was dismissed and reinstated on Parole.

**VIOLATION(S) SPECIFIED:** The above-named offender has violated conditions of supervision by:

**Violation 1:** Using illegal drugs, amphetamine on or about 2/23/06.

**Violation 2:** Using illegal drugs, amphetamine/methamphetamine on or about 2/28/06.

**SUPPORTING EVIDENCE:**

**Violation 1 & 2:** At the time of Mr. Miller's parole he was ordered to not use, possess or control any dangerous drugs, narcotics or controlled substances without a valid prescription from a licensed physician. He was further ordered to submit no less than one clean urinalysis/breathalyzer weekly. On 9/23/05, he signed an Order of Parole and Conditions form acknowledging his responsibility to comply.

On 2/23/06, Mr. Miller reported to DOC in Goldendale as directed. A urine sample was collected, witnessed by CCO Max Horn. An in-office test strip indicated it was positive for amphetamine. Mr. Miller denied using any illegal drugs and provided the names of two medications he was currently taking; Albuteral & Cialis. The urine sample was packaged up and mailed to Sterling Reference Laboratory (SRL) in Tacoma WA for confirmation. On 3/1/06, DOC received the confirmation report from SRL indicating the UA taken on 2/23/06 was indeed positive for Amphetamine at 149 ng/ml. Furthermore, the report summary indicated that the "Positive amphetamines result is not consistent with listed medications."

Page 1 of 3

DOC 09-114 (F&P Rev. 11/05/2003) OCO / POL

DOC 320.100 DOC 320.155  
BOARD - NOTICE OF VIOLATION

APPENDIX # 3

On 2/28/06, Mr. Miller reported to DOC in Goldendale as directed. A urine sample was collected, again witnessed by CCO Max Horn. An in-office test strip indicated it was positive for amphetamine. Mr. Miller again denied using any illegal drugs and provided the names of two medication he was currently taking; Albuteral & Cialis. The urine sample was packaged up and mailed to SRL for confirmation. On 3/9/06, DOC received the confirmation report from SRL indicating the UA taken on 2/28/06 was indeed positive for Amphetamines at 207 ng/ml as well as Methamphetamine at 187 ng/ml. The report summary again indicated that the "Positive amphetamines result is not consistent with listed medications."

On 3/9/06, I called SRL and spoke to Bert Toivola, Ph.D., Assoc. Technical Director. We discussed the interpretation of these two UA results. Dr. Toivola informed me that a positive amphetamine result as reconfirmed by GC/MS Kit Confirmations/Retests (LOQ/LOD) cannot be a false positive. He explained that methamphetamine breaks down to amphetamine in the body, which indicates that both the UA results from 2/23/06 and 2/28/06 do undeniably indicate that methamphetamine had been ingested. I requested certified copies of these lab reports as well as his written explanation as to what he told me, be faxed to Interstate Compact in Olympia WA to forward to Interstate Compact in Salem OR per Oregon's request.

#### **ADJUSTMENT:**

Mr. Miller's adjustment since his release from prison has been almost non-existent other than reporting on a weekly basis. From all reports, he has yet to find legal gainful employment. He continues to terrorize his sister, who has custody of Mr. Miller's daughter and he has been confrontational with his mother in the past. According to the conversation with Dr. Toivola with SRL the UA taken on 12/6/05, which tested positive for Amphetamine at 139 ng/ml and was confirmed by his lab indicate Mr. Miller also consumed methamphetamine on or about that time frame as well. This CCO didn't pursue further investigation on this UA, as Mr. Miller indicated he was taking prescription medication which had not been listed. He was however unable to produce a prescription of what that medication was. Thus, the violation was dismissed as probable cause was not found. Not pursuing this violation appears to be a mistake on this CCO's part.

On 2/28/06, Mr. Miller was arrested on an Oregon Parole Violation Warrant, under Multnomah Co. cause #840330993. He was transported to the Klickitat Co. Jail in Goldendale WA and then was transported to OR. He is currently contesting the violations and a Morrissey Hearing has been scheduled.

Although, Mr. Miller clearly understood his parole conditions he failed to comply. It appears his previous revocation of his parole for almost 4 years did nothing to rehabilitate him. Thus, the following recommendation seems appropriate.

Page 2 of 3

EXHIBIT # 3

**RECOMMENDATION:**

I recommend the ISRB issue a Parole Revocation Warrant for Mr. Miller's arrest. I further recommend that at the time of his hearing he be ordered to serve 5 years in prison consecutive to any time he receives in Oregon for his OR parole violations.

*I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.*

Submitted By:  
Ronda L. Nielsen

Approved By:  
G.V. Allum 3/10/06

DATE 3/9/06

DATE

Ronda L. Nielsen  
COMMUNITY CORRECTIONS OFFICER  
Goldendale Field Office  
228 S. Columbus Ave. #103  
Goldendale, Washington 98620  
Telephone (509) 773 - 3708

Gerald Allum, CCS

rln / CCO Ronda Nielsen / 3/9/06

Distribution:    **ORIGINAL** - Board    **COPY** - Attorney General, Defense Attorney, File

*The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, REW 42.17, and RCW 40.14.*

Page 3 of 3

DOC 09-114 (F&P Rev. 11/05/2003) OCO / POL

DOC 320.100    DOC 320.155  
BOARD - NOTICE OF VIOLATION



DECLARATION OF MARK LEE MILLER

I, Mark Lee Miller, declare the following to be true and correct to the best of my knowledge, belief, and understanding, under penalty of perjury:

- (1) December 1997, I am contacted by Julie Scherf (my commonlaw wife with whom I have had a years long meretricious relationship) and informed that Ronda Nielsen came to our home at 629 N.E. 2d Street, Goldendale WA, and told her that after I am released from prison she will have my parole revoked and send me back to prison before I am home one year.
- (2) Nielsen has no legal cause to be at my residence. The address was already approved, and Nielsen was not required to verify the address.
- (3) I file a complaint with the ISRB, which forwards it to the Department of Corrections, then subsequently ignored by them.
- (4) Nielsen begins supervising me in March 1998. She imposes supervision conditions not required by the ISRB -which includes prohibiting me from leaving my county of residence without her permission.
- (5) Nielsen appears on my jobsites and interferes with my work performance and duties.
- (6) When I allow my U/A specimen to leave my sight for the first time in 1998, I then receive the first positive U/A result of my life.
- (7) Nielsen asks for my parole to be revoked and for my return to prison, despite a grid-range of 0 - 60 days.
- (8) Nielsen suggests to me that I should have a DNA test performed on my son to establish paternity, and to confirm whether Leroy is in fact my son. Nielsen asserts that he is not.
- (9) Julie Scherf informs me that Nielsen asked her if she was sure that Leroy was my son. Nielsen further stated that "He looks an awful lot like a Feller." (referring to Fred Feller, a former paramour of Julie's).
- (10) Nielsen seeks and obtains conditions of supervision designed to effect the breakup of my family unit.

[ DECLARATION OF MARK LEE MILLER — Page 1 ]

APPENDIX # F  
EXHIBIT # 4

- (11) Nielsen tells me that Julie is not good for me, and that Julie only wants to use me. Nielsen assures me that Scherf will turn on me when it suits her.
- (12) February 2002, Nielsen authorizes my moving into the residence of Julie Scherf at 100 E. Court Street, Goldendale, WA, despite no contact orders in place by the parole boards of two states. Nielsen then waits nearly a month before notifying the ISRB of the action.
- (13) After the ISRB denies approval of the action around 11 March 2002, Nielsen then files two violation reports (one in Washington and one in Oregon) for the contact that she previously authorized).
- (14) Nielsen has submitted violation reports to the Oregon Board of Parole without having the reports reviewed or countersigned by the Compact Administrator or her supervising officer. Nielsen has also countersigned her own reports and signatures in order to circumvent her duty to have the reports reviewed prior to submitting the reports to the Oregon Board of Parole.
- (15) PRIOR to an onsite parole revocation hearing in 2002, I am told by Gwendolyn Grundei [my attorney] that Nielsen has informed her that I will receive five years in parole sanctions.
- (16) Julie Scherf also informs me that Nielsen has informed her that I will get five years in sanctions, "so that I will have enough time to get over her." [Julie].
- (17) The ISRB gives me an initial sanction of two years on the violations. At a subsequent point one hundred hearing, I am then given another three years. My total sanction is five years.
- (18) Nielsen disseminates and exchanges confidential records and information regarding myself and my children (Leroy and Cheyenne Miller) with Rene Christensen (without legal authorization) outside of official protocol and in violation of RCW 13.34, 13.50 and title 25 U.S.C. §§ 1901 et seq. When I confront Nielsen regarding her actions she claims that I signed a release authorizing the disclosures. When requested to produce the authorization she fails to do so.

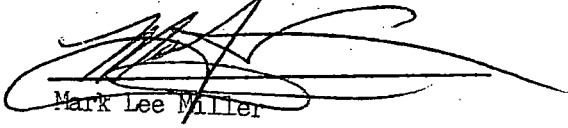
[ DECLARATION OF MARK LEE MILLER — Page 2 ]

EXHIBIT # 4

- (19) Nielsen uses her position as my parole officer to threaten, intimidate, and attempt to coerce me into withdrawing my opposition to the attempt to terminate Julie Scherf's parental rights by the DSHS-DCFS, (which is being led by her friend, Rene Christensen) and my demand that Julie, myself, and all of our children be treated fairly and equally in the dependency proceedings. Nielsen repeatedly asks me why I oppose Julie having her parental rights terminated.
- (20) I am informed by Julie Scherf, James Johnson, and Marc Qualls (each on separate occasions) that Nielsen went to the Klickitat County Jail and told Marc Qualls (a recent paramour of Scherf's) that I was romantically involved with Scherf in an attempt to instigate and promote a violent confrontation between Qualls and myself.
- (21) I confront Nielsen regarding her actions with Qualls, and am told that she simply did not want Qualls trying to live with Ms. Scherf.
- (22) January 2005 — Ronda Nielsen calls two Goldendale Police officers to come to her office to arrest me before she has had me provide a U/A specimen. After I provide the specimen - with both officers in attendance. - Nielsen goes on a verbal tirade accusing me of disseminating pornography to my daughter (Cheyenne) and inappropriately touching my daughter by tickling her.
- (23) Nielsen then orders my arrest after barely glancing at the test strip. She states, "You're dirty for meth! Nothing tests positive for meth but meth!"
- (24) I ask Nielsen to show me the test strip - which she holds under my nose. Nonetheless, I point out that the test strip clearly shows a negative result. To this, Nielsen replies, "I am not going to debate this with you. I say it's positive, so it's positive. You're under arrest."
- (25) Later that night Nielsen comes to the jail and informs me that she breached the seal on the U/A specimen and repackaged it for shipping.
- (26) Nielsen, nine (9) days later, has me released from jail and explains to me that it was all a terrible mistake due to the medications that I was taking. She further explains that had it not been for the pornography and my attitude about Julie she would not likely have had me arrested.

- (27) I ask for a copy of the test results and the test strip. I further inform Nielsen that she has no business being involved in any part of either the dependencies, or my child rearing practices.
- (28) Two days later Nielsen and Christensen attempt to force me to accept Nielsen's inclusion into my Workfirst program under threat of loss or reduction of my TANF benefits. On my refusal, my case worker, Tammy B., terminates my benefits.
- (29) Nielsen next knowingly and deliberately filed reports with both the ISRB and the OREGON Board of Parole which asserted that I disseminated pornography to my daughter — Cheyenne R. Miller — when Nielsen knew that there was no factual basis to the allegation at the time she made the claims. Nielsen deliberately filed false reports of misconduct in vindictive retaliation for my lawful attempts to exercise legal rights in defense of myself, my children, and for my attempts to secure the equal protection of the laws for myself and my Indian family.
- (30) In the third week of February, 2006, I called Gerald Allum, Ronda Nielsen's immediate supervisor, in order to discuss the inappropriate conduct of Nielsen in regards to her handling of my case, as WELL AS her conduct and interaction with Rene Christensen and Gale Gorrod. I further served Nielsen a subpoena duces tecum to appear in Superior Court in order to present in a legal forum the inappropriate and concerted actions of Nielsen, Christensen, and Gorrod to bring about the wrongful termination of Julie Scherf's parental rights, and to deny our children the equal protection of the laws.
- (31) Nielsen did then and there immediately request and obtain a warrant for the wrongful arrest of myself. She maliciously and vindictively secured my wrongful arrest and imprisonment for my lawful exercise of legal rights to secure the equal protection of the laws for myself, my children, and Julie Scherf, with the specific intent to hinder, delay, obstruct or prevent the presentation of evidence and/or testimony from being presented in the Superior Court of Washington in an official proceeding governed by title 25 USC §§ 1901 et seq., and other federal provisions.

DONE ON THIS 25th day of August, 2005, at Shelton Washington.

  
Mark Lee Miller

Agency Name: **WA DOC - GOLDENDALE OFFICE**  
Donor Name: **MILLER, MARK L**  
Collected: **2/23/2006**  
Received: **2/27/2006 @ 4:12 PM**  
Reported: **3/ 9/2006 @ 4:14 PM**

Accession: **7528037**  
SSN: **265210**  
Donor Client ID: **265210**  
Specimen ID: **7528037**

**Final Report**

Test Name	Result	Screening CutOff	GC/MS Quantitations	GC/MS Cutoff
Classification		None selected		
Community Corrections Officer		SE14		
Current Residence		Community		
DOSA		No		
Reason For Testing		Random		

**Adulterant Screening Panel**

Creatinine		133.5	> 20 mg/dL
Nitrite	NEG		500 mcg/mL
pH		6.8	3.0 - 11.0
Oxidants	NEG		150 mg/L

**GC/MS Kit Confirmations/Rerests (LOQ/LOD)**

> Amphetamines - GC/MS POSITIVE H  
Amphetamine 149 ng/mL 80 ng/mL

**Additional Tests**

Certification

Certified True and Complete

*Bruce L. Houk*

Bruce L. Houk, MT(ASCP) - Certifying Scientist  
(Signed out 3/ 1/2006)

**Report Summary**

**Interpretation:**

Amphetamine

Positive amphetamines result is not consistent with listed medication(s).

Certification

I certify (or declare) under penalty of perjury under the laws of the state of Washington that the foregoing information is true, correct and accurate (RCW9A.72.085)

*Bert Toivola* P10

SIGNATURE

*Tacoma WA*

PLACE SIGNED

*9-24-07*

DATE

**Bert Toivola, Ph.D.**  
**Technical Director**

*State's Exhibit #1A*

Print Date: 9/24/2007 8:58 AM

**APPENDIX #**



**STERLIO**  
REFERENCE LABORATORIES  
a division of regional toxicology services, llc

800-442-0438  
FAX: 253-552-1549



7528037

SPECIMEN ID

**TO BE COMPLETED BY COLLECTOR (please print clearly)**

Donor Name (Last, First, M) Miller, Mark L.

Donor ID Number DOC # 265210 ~~X Hospital~~  
MUST BE UNIQUE TO DONOR

CLIENT 051400

WA DOC - GOLDENDALE OFFICE  
228 S Columbus Ave, Ste. 103,  
Goldendale, WA, 98620  
5097733708

**STEP 2 Select Test To Be Performed:** (Check One)

CCO Position # SE14

DOCNEW STANDARD 4 DRUG TEST (Amp, Coc, Opa, THC w/Adulterant Test)

Other drug(s) to be tested: \_\_\_\_\_

KTCNFM X "ON-SITE" TEST KIT CONFIRMATION

Circle drug(s) to be confirmed: Amphetamine Methamphetamine Cocaine Opiate THC

REASON FOR TESTING (circle one): Canine Cause Random Transfer EFV-PRE EFV-MID  
EFV-POST VIRP-ADM VIRP-MID CD-ADM CD-MO

**ADDITIONAL DONOR INFORMATION**

DOSA: Yes \_\_\_\_\_ No X

Current Residence: \_\_\_\_\_ Prison \_\_\_\_\_ Work Release X Community

Housing Unit Code (Prison Use Only): \_\_\_\_\_ Classification (circle one): RMA RMB RMC RMD

LIST MEDICATIONS CURRENTLY BEING TAKEN:

Albuterol, Galis

BILL ORDERING AGENCY (Net 30)

Client #51400 REVISED 1/27/05sp

**STEP 3 TO BE COMPLETED BY COLLECTOR**

Collection Observed X Yes ☐ No Collection Date: 2/23/2006 Specimen Bottle(s) Released To: ☐ Courier X Mail  
Month Day Year ☐ Other

Specimen Temperature must be read within 4 minutes of collection Specimen Temperature within range: (90°-100°F / 32°-38°C) ☐ Yes ☐ No

**Collector Certification:** I certify that the specimen identified on this form was given to me by the donor identified above and was collected, labeled, sealed, and transferred to the delivery service indicated.

Max H  
Collector Signature

Max Horn  
Collector Name (printed)

**STEP 4 TO BE COMPLETED BY DONOR**

**Donor Consent:** I consent to the collection and testing of the specimen (blood or urine) for drugs and/or alcohol and certify that the specimen(s) submitted to the laboratory is/are my own and accurately labeled and securely sealed. I consent to the reporting of results only to the employer or requesting agency.

I also certify that this specimen is fresh & has not been adulterated in any manner.

[Signature]  
Donor Signature

Date: \_\_\_\_\_

TAMPER SEAL

PLACE OVER TOP OF BOTTLE

FOR LAB USE ONLY Received at lab by \_\_\_\_\_ Date \_\_\_\_\_ Spe

DONOR COPY

2/23/06  
Date

7528037

Specimen ID

States Exh

[Signature]  
Donor Initials

EXHIBIT # 6



P (800) 442-0438  
FAX: (253) 552-1549

Page: 1

Agency Name: **WA DOC - GOLDENDALE OFFICE**

Accession: **7528015**

Donor Name: **MILLER, MARK L**

SSN: **265210**

Collected: **2/28/2006**

Donor Client ID: **265210**

Received: **3/ 5/2006 @ 11:17 AM**

Specimen ID: **7528015**

Reported: **3/ 9/2006 @ 4:12 PM**

**Final Report**

Test Name	Result	Screening Cutoff	GC/MS Cutoff
-----------	--------	---------------------	-----------------

Classification	RMA
Community Corrections Officer	SE14
Current Residence	Community
DOSA	No
Reason For Testing	Random

**Adulterant Screening Panel**

Creatinine	L	17.6	> 20 mg/dL
Specific Gravity		1.005	1.003 - 1.030
Nitrite	NEG		500 mcg/mL
pH		5.5	3.0 - 11.0
Oxidants	NEG		150 mg/L

**GC/MS Kit Confirmations/Retests (LOQ/LOD)**

> Amphetamines - GC/MS	POSITIVE	H
	Amphetamine	207 ng/mL 80 ng/mL
	Methamphetamine	187 ng/mL 80 ng/mL

**Additional Tests**

Certification

Certified True and Complete

Bruce L. Houk, MT(ASCP) - Certifying Scientist  
(Signed out 3/ 9/2006)

Report Summary

**Interpretation:**

Amphetamine

Positive amphetamines result is not consistent with listed medication(s).

Certification

I certify (or declare) under penalty of perjury under the laws of the state of Washington that the foregoing information is true, correct and accurate (RCW9A.72.085)

SIGNATURE

Tacong WA  
PLACE SIGNED

9-24-07  
DATE

**Bert Toivola, Ph.D.**  
**Technical Director**

Print Date: 9/24/2007 8:58 AM

State's Exhibit  
2A



**STERLIO**  
REFERENCE LABORATORIES  
a division of regional toxicology services, llc

800-442-0438  
FAX: 253-552-1549



7528015

SPECIMEN ID

**STEP 1 TO BE COMPLETED BY COLLECTOR (please print clearly)**

Donor Name (Last, First, M)

*Miller, Mark*

Donor ID Number (DOC #)

*265210*

X (Optional)

MUST BE UNIQUE TO DONOR

CLIENT 051400

WA DOC - GOLDENDALE OFFICE  
228 S Columbus Ave, Ste. 103,  
Goldendale, WA, 98620  
5097733708

**STEP 2 Select Test To Be Performed:**

(Check One)

CCO Position # *SE11*

DOCNEW ☐ STANDARD 4 DRUG TEST (Amp, Coc, Ops, THC w/Adulterant Test)

Other drug(s) to be tested: \_\_\_\_\_

KTCNFM ☒ "ON-SITE" TEST KIT CONFIRMATION

Circle drug(s) to be confirmed: Amphetamine Methamphetamine Cocaine Opiate THC

REASON FOR TESTING (circle one): Canine Cause Random Transfer EFV-PRE EFV-MID  
EFV-POST VIRP-ADM VIRP-MID CD-ADM CD-MO

**ADDITIONAL DONOR INFORMATION**

DOSA: Yes ☐ No ☒

Current Residence: ☐ Prison ☐ Work Release ☒ Community

Housing Unit Code (Prison Use Only): \_\_\_\_\_ Classification (circle one): RMA RMB RMC RMD

LIST MEDICATIONS CURRENTLY BEING TAKEN:

*Albuterol Cialis*

BILL ORDERING AGENCY (Net 30)

Client #51400

REVISED 1/27/05sp

**STEP 3 TO BE COMPLETED BY COLLECTOR**

Collection Observed ☒ Yes ☐ No Collection Date: *2/28/2006* Specimen Bottle(s) Released To: ☐ Courier ☒ Mail  
Month Day Year ☐ Other

Specimen Temperature must be read within 4 minutes of collection Specimen Temperature within range: (90°-100°F / 32°-38°C) ☐ Yes ☐ No

**Collector Certification:** I certify that the specimen identified on this form was given to me by the donor identified above and was collected, labeled, sealed, and transferred to the delivery service indicated.

Collector Signature

*Mark Miller*

Collector Name (printed)

*Mark Miller*

**STEP 4 TO BE COMPLETED BY DONOR**

**Donor Consent:** I consent to the collection and testing of the specimen (blood or urine) for drugs and/or alcohol and certify that the specimen(s) submitted to the laboratory is/are my own and accurately labeled and securely sealed. I consent to the reporting of results only to the employer or requesting agency.

I also certify that this specimen is fresh & has not been adulterated in any manner.

Donor Signature

*Mark Miller*

Date

*2-28-06*

TAMPER SEAL

Date

Donor Initials

PLACE OVER TOP OF BOTTLE

FOR LAB USE ONLY

Received at lab by

Date

Specimen Seal Intact

DONOR COPY

PDU-24869\_2nd Installment 000145

7528015

Specimen ID

*State's Exhibit*  
*2B*

EXHIBIT #8




**LEVEL I-INITIAL GRIEVANCE**  
**NIVEL 1-QUEJA INICIAL**

Name: NOMBRE:	Last APELLIDO	First PRIMERO NOMBRE	Middle 2DO NOMBRE	DOC Number NUMERO DOC	Facility/FACILIDAD Office	Unit/Cell UNIDAD/CELDA
	Miller	Mark		356210	WCC	R1F8

**PART A - INITIAL GRIEVANCE/PARTE A - QUEJA INICIAL**

Date Typed 3/25/13

Date Due

**I WANT TO GRIEVE:** DOC 420.380 Drug and Alcohol testing policy. Policy currently allows an offender to be sanctioned on nothing more than a CCO's statement that the unit provided a positive result. Neither the specimen, nor the test unit is maintained in evidence. This system lacks checks, balances, and oversight. Nothing within the system allows one to determine at what toxicity level. The device registers a positive result. Levels to toxicity (mg/ml) vary between each instance. The current system does not account for personal biases or system error. Section VII, 2: Only allows discretionary re-tests using on-site system; thus, the issue of off cal bias is not dealt with. Confirmatory results using GC/MS is required in order to have an understanding of baseline, as well as other environmental influences. Section IV, A., is currently meaningless without respect to procedural protections.

**SUGGESTED REMEDY:** (1) Reinstate NIDA Standard cut off levels

(2) Require GC/MS confirmation before test results can be used as bias for Sanctions.

(3) Require offender have an opportunity within 1-hour to provide second specimens Using supplemental on site system before requesting confirm

/s/ Sharon Thach

3/25/13

Inmate Miller, Mark

3/25/13

Grievance Coordinator Signature

Date

Grievant Signature

Date

FIRMA DE COORDINADOR DE QUEJAS

FECHA

FIRMA DE QUEJANTE

FECHA

**PART B - LEVEL I RESPONSE/PARTE B RESPUESTA PRIMER NIVEL**

After conducting my initial investigation and reviewing the current UA process under DOC/WCC Policy 420.380 Drug and Alcohol Testing. On 1-8-13 you had an IRSB Hearing on 2-4-13 you Parole was revoked. Addressing the issues, Maintain the Chain of Evidence in Attachment 2 of policy is monitored and secured in a secure and locked room. All specimens is handled by DOC 14-038 Drug Test Log Chain of Custody Assurance, DOC 14-037 Instant On-Site Drug Testing and Breathalyzer Data collection Sheet or approved equivalent. Employees/contract staff will only use drug testing options that are approved by the Department per set guidelines (Attachment 1). The Drug Testing Coordinator/CCS or designee to coordinate, monitor, and provide the services of drug testing program. Drug testers receive training from the Drug Testing Coordinator; this training will cover the use of all approved drug/alcohol screening instruments. Monthly accuracy check will be done per manufacturer's instruction; calibration will be conducted by certified, trained personnel at least every 6 months. This information will be logged on DOC 14-311 Accuracy/Calibration Check Record. Test results of .020 or higher is a positive result. All specimens are sent to the contracted lab (Chromatography Mass Spectrometry (GC/MS) and liquid Chromatography Mass Spectrometry (LCMS), to be tested for adulterants: nitrites, creatinine, pH, and specific gravity. With the information you submitted and the current drug testing process set in place, you provided no evidence of any or procedural errors. An offender may be tested any time they return from any absence or documented history of drug/alcohol violation.

/s/ Sharon Thach

3/25/13

Grievance Coordinator Signature  
COORDINADOR DE QUEJASDate  
FECHA


**EXHIBIT # 9**

You may appeal this response by submitting a written appeal to the coordinator within five (5) working days from date this response was received. Ud. puede apelar esta respuesta al someter una apelación por escrito al coordinador dentro de cinco (5) días de trabajo de la fecha en que esta respuesta fue recibida.



LOG I.D. NUMBER

13530183

APPEAL TO LEVEL II  
APELACIÓN AL 2DO NIVEL

Name: NOMBRE:	Last APELLIDO	First PRIMERO NOMBRE	Middle 2DO NOMBRE	DOC Number NUMERO DOC	Facility/FACILIDAD Office	Unit/Cell UNIDAD/CELDA
	Miller	Mark	L	265210	WCC	R5 E13
PART A - INITIAL GRIEVANCE/PARTE A - QUEJA INICIAL				Date Typed 04/03/2013	Date Due 05/01/2013	
<p><b>I WANT TO APPEAL:</b> DOC 420.380. Addressing your assignments of error to my complaint: 1) No consent for testing was signed by myself on 29 December 2012. 2) DOC lacked legal authority to require me to provide a u/a on that date (see Conditions of Supervision #3-ISR) and Nielsen knew that at the time she demanded me to provide u/a. 3) No chain of custody log exists - and both specimen and test were destroyed. 4) I was never notified that policy allows me to provide second specimen if not happy w/results of first. 5) Confirmatory retesting is only performed at discretion of CCO. 6) .020 is in direct violation of Nationally Mandated NIDA levels. 7) No system exists to establish proper collection of individual drug testing units.</p> <p><b>SUGGESTED REMEDY:</b> 1) Reinstate NIDA standard cut-off levels. 2) Require gc/ms confirmation before test results can be used as basis for sanction. 3) require offender have 1 hour to provide second on site specimen before requesting confirmatory retest.</p>						
/s/ S. Thach		04/03/2013		/s/ Mark Miller		04/03/2013
Grievance Coordinator Signature		Date		Grievant Signature		Date
FIRMA DE COORDINADOR DE QUEJAS		FECHA		FIRMA DE QUEJANTE		FECHA

## PART B - LEVEL II RESPONSE/PARTE B RESPUESTA 2DO NIVEL

I reviewed your Level I grievance, the response, and your Level II appeal.

DOC Investigator J. Murphy also reviewed this grievance and provided this response:

Your parole was revoked on 02/04/13. The information that the ISR Hearing Officers used in rendering their decision is not grievable. At the time of the hearing you had an opportunity to oppose the information provided; for example, whether or not you were required to submit to a urinalysis (UA). In addition, per policy you were provided the opportunity to appeal the hearing decision and challenge the validity of the evidence to include the signed consent, or lack thereof; the authority to require you to provide a UA; the chain of custody applied or not applied to your specimen; the notification you received or did not receive allowing you to provide a new specimen; whether confirmatory testing was required and/or performed; and the testing levels of the National Institute on Drug Abuse (NIDA).

In regards to DOC 420.380, and the directives it gives to ensure proper collection, as well as your suggested remedies, I will pass your concerns along to the policy author for consideration during the next policy review cycle.

  
Superintendent, Work Release Supervisor, Field Administration Signature  
SUPERINTENDENT

4/22/13  
Date  
FECHA

You may appeal this response by submitting a written appeal to the coordinator within cinco (5) working days from date this response was received. Ud. puede apelar esta respuesta al someter una apelación por escrito al coordinador dentro de cinco (5) días de trabajo después de que la respuesta fue recibida.

EXHIBIT # 10

CODE OF FEDERAL REGULATIONS

Title 10

Part 26 -- Fitness For Duty Program

§ 26.163 Cutoff levels for drugs and drug metabolites.

(a) Initial drug testing.

(1) HHS-certified laboratories shall apply the following cutoff levels for initial testing of specimens to determine whether they are negative for the indicated drugs and drug metabolites, except if validity testing indicates that the specimen is dilute or the licensee or other entity has established more stringent cutoff levels:

Drug or metabolites	Cutoff level [nanograms (ng)/mL]
---------------------	--

Marijuana metabolites .....	50
Cocaine metabolites .....	300
Opiate metabolites .....	2000
Phencyclidine metabolites .....	25
Amphetamines .....	1000

(2) At the licensee's or other entity's discretion in the FFD program policies and procedures, the licensee or other entity may require the HHS-certified laboratory to conduct special analyses of dilute specimens as follows:

- (i) If initial testing indicates that a specimen is dilute, the HHS-certified laboratory shall compare the responses of the dilute specimen to the cutoff calibrator in each of the drug classes;
- (ii) If any response is equal to or greater than 50 percent of the cutoff, the HHS-certified laboratory shall conduct confirmatory testing of the specimen down to the LOD for those drugs and/or drug metabolites; and
- (iii) The laboratory shall report the numerical values obtained from this special analysis to the MRO.

CODE OF FEDERAL REGULATIONS

Title 10

Part 26--Fitness For Duty Programs

§ 26.163 Cutoff levels for drugs and drug metabolites

**(b) Confirmatory drug testing.**

(1) A specimen that is identified as positive on an initial drug test must be subject to confirmatory testing for the class(es) of drugs for which the specimen initially tested positive. The HHS-certified laboratory shall apply the confirmatory cutoff levels specified in this paragraph, except if the licensee or other entity requires the special analysis of dilute specimens permitted in paragraph (a)(2) of this section or the licensee or other entity has established more stringent cutoff levels.

Confirmatory cutoff Levels for Drugs and Drug Metabolites

Drug or metabolites	Cutoff level (ng/mL)
Marijuana metabolite [FN 1] .....	15
Cocaine metabolite [FN2] .....	150
Opiates:	
Morphine .....	2000
Codeine .....	2000
6-acetylmorphine [FN3] .....	10
Phencyclidine (PCP) .....	25
AMphetamines .....	500
Methamphetamine [FN4] .....	500

[FN 1] As delta-9-tetrahydrocannabinol-9-carboxylic acid.

[FN 2] As benzoylmeconine

[FN 3] Test for 6-AM when the confirmatory test shows a morphine concentration exceeding 2,000 ng/mL.

[FN 4] Specimen must also contain amphetamine at a concentration equal to or greater than 200 ng/mL.

EXHIBIT # 1

CODE OF FEDERAL REGULATIONS

Title 10

Part 26 - Fitness For Duty Programs

§ 26.163 Cutoff levels for drugs and drug metabolites

(b)

(2) Each confirmatory drug test must provide a quantitative result. When the concentration of a drug or metabolite exceeds the linear range of the standard curve, the laboratory may record the result as "exceeds the linear range of the test" or as "equal to or greater than <insert the value for the upper limit of the linear range>," or may dilute the aliquot of the specimen to obtain an accurate quantitative result when the concentration is above the upper limit of the linear range.

# Item 9

DOC Policy 420.380 in effect  
December 2011



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
10/4/10

PAGE NUMBER  
1 of 11

NUMBER  
**DOC 420.380**

## POLICY

TITLE  
**DRUG/ALCOHOL TESTING**

### REVIEW/REVISION HISTORY:

Effective: 8/31/98  
Revised: 8/20/99  
Revised: 5/27/03  
Revised: 1/21/05  
Revised: 3/26/07 AB 07-008  
Revised: 12/5/07  
Revised: 12/18/07 AB 07-039  
Revised: 10/4/10

### SUMMARY OF REVISION/REVIEW:

Major changes, including incorporating medicinal marijuana content from DOC 380.200 Community Supervision of Offenders. Read carefully!

### APPROVED:

**ELDON VAIL**, Secretary  
Department of Corrections

8/25/10  
Date Signed



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD  
OFFENDER/SPANISH MANUALS**

REVISION DATE  
10/4/10

PAGE NUMBER  
2 of 11

NUMBER  
**DOC 420.380**

**POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

**REFERENCES:**

DOC 100.100 is hereby incorporated into this policy; RCW 69.51A.010; WAC 137-28; WAC 137-56; ACA 5A-09; DOC 320.150 Disciplinary Sanctions; DOC 420.310 Searches of Offenders; DOC 460.000 Disciplinary Process for Prisons; DOC 460.130 Violations and Hearings; DOC 460.135 Disciplinary Procedures for Work Release; DOC 590.100 Extended Family Visiting; DOC 670.500 Chemical Dependency Treatment Services; DOC 670.655 Special Drug Offender Sentencing Alternative; Records Retention Schedule

**POLICY:**

- I. The Department will manage targeted and random substance abuse testing that provides for nondiscrimination. Drug testing will be used as a management tool that will enhance supervision, function as a treatment tool, and serve as a deterrent to drug use.

**DIRECTIVE:**

- I. Responsibilities
  - A. Staff can only use drug testing options that are approved by the Department.
    1. Department approved testing methods and guidelines for appropriate use are covered in Attachment 3.
  - B. Each Superintendent/Field Administrator is responsible for ensuring that drug and alcohol testing meets the expectations of this policy. S/he will appoint a Drug Testing Coordinator responsible for the coordination, monitoring, and service provisions of the drug testing program.
  - C. The Headquarters Prison designee will coordinate training for Drug Testing Coordinators and implement a quality assurance program.
  - D. Drug Testing Coordinators will train Department and contract staff involved in any portion of the drug and alcohol testing process. Training will cover the use of all drug/alcohol screening instruments approved by the Department.
- II. Testing in Prison
  - A. Scheduled testing will be conducted in facilities before offenders are transferred to a minimum facility or Work Release.
    1. Upon receipt of a Notice of Transfer manifest, the Correctional Records Supervisor will notify the Drug Testing Coordinator/designee to schedule a urinalysis (UA). The Drug Testing Coordinator/designee will use an instant on-site test or other drug screen no more than 48 hours prior to the





STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
10/4/10

PAGE NUMBER  
3 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

date of transfer to ensure the offender's sample is clean prior to completing the transfer.

- a. All results from an instant test must be noted on DOC 14-037 Instant On-Site Drug Testing and Breathalyzer Data Collection Sheet.
2. If the test result is positive, the appropriate staff will be notified and the transfer delayed until a disciplinary hearing is completed.
- B. Testing will be conducted before and after Extended Family Visits (EFVs) per DOC 590.100 Extended Family Visiting, and may be conducted during the visit. All results from an instant test must be confirmed by the lab and noted on DOC 14-037 Instant On-Site Drug Testing and Breathalyzer Data Collection Sheet.
  1. Prior to the EFV, the offender will submit to an instant on-site test. If the test result is positive or shows as diluted, the visit will be suspended pending a confirmation test and, if applicable, a disciplinary hearing.
  2. During the EFV, the offender may be required to submit to random instant on-site tests. If the test result is positive or shows as diluted, the visit will be terminated.
  3. Upon conclusion of the EFV, a drug/alcohol test will be conducted at the time of the routine strip search before the offender returns to the living unit.
- C. A breath alcohol test may be given when a staff has reason to believe that the offender has used, possessed, or possesses substances containing alcohol.
- D. Offenders participating in chemical dependency treatment will be subject to drug/alcohol testing:
  1. Upon admission to treatment, and
  2. Randomly, or for cause, at the discretion of the treatment provider/ Counselor.
- E. A minimum of 2 percent of the average daily population at each Prison will be randomly tested. Planning and Research will send a list of offenders to be tested to a secure printer at each facility by the 5<sup>th</sup> of each month.
- F. An offender may also be randomly tested:
  1. When s/he returns from an absence (e.g., court appearance, outside work crew, outside medical appointment).



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
10/4/10

PAGE NUMBER  
4 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

2. If the offender has a documented history of drug/alcohol related disciplinary reports.

### III. Testing in Work Release

- A. Testing will be conducted using an instant on-site test.
- B. Testing will be conducted within 24 hours for offenders entering Work Release directly from the community.
- C. Offenders will be tested according to their Custody Facility Plan.
- D. A breath alcohol test may be given when a staff has reason to believe that the offender has used, possessed, or possesses substances containing alcohol.
- E. All offenders participating in chemical dependency treatment will be subject to drug/alcohol testing:
  1. Upon admission to treatment, and
  2. Randomly, or for cause, at the discretion of the treatment provider/CCO.

### IV. Testing in the Community

- A. Primary testing will be conducted using an instant on-site test.
- B. Offenders that have a prohibition not to use controlled substances/alcohol or a condition to submit to drug testing/breathalyzer, or who have affirmative conduct in this area, will be tested.
  1. Offenders subject to UA testing will receive a baseline test when they first report to the Field Office in the catchment area where they are assigned.
  2. Additional testing will be conducted for the first 6 months of supervision as follows for offenders with face-to-face contacts per the contact standards, or court imposed conditions, prohibitions, affirmative conduct, or Offender Supervision Plan:
    - a. High Risk Violent and High Risk Non-Violent - Monthly, which may be reduced to quarterly after 3 consecutive negative tests.
    - b. Moderate and Low Risk - Quarterly, which may be reduced to every 6 months after 3 consecutive negative tests.
- C. A breath alcohol test may be given when a staff has reason to believe that the offender has used, possessed, or possesses substances containing alcohol.



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY

**PRISON/WORK RELEASE/FIELD**

OFFENDER/SPANISH MANUALS

REVISION DATE

10/4/10

PAGE NUMBER

5 of 11

NUMBER

**DOC 420.380**

**POLICY**


TITLE

**DRUG/ALCOHOL TESTING**

- D. Drug Offender Sentencing Alternative (DOSA) offenders in community based residential treatment will be tested at the discretion of the treatment provider.
1. Staff will conduct testing on all DOSA offenders on release from Prison or residential treatment or when community supervision begins.
  2. Staff will conduct testing on DOSA offenders who fail to report for a scheduled treatment appointment.
  3. All DOSA offenders will be required to submit to weekly drug testing for the first 3 months following release from Prison or from residential treatment. If test results are negative, thereafter, testing will be conducted as required for offenders with face-to-face contacts per the contact standards, or court imposed conditions, prohibitions, affirmative conduct, or Offender Supervision Plan.

V. Testing for Cause

- A. The Superintendent/facility CCS will identify staff authorized to require tests for cause reasons.
- B. Cause for testing may include:
1. Direct observation by a staff or reliable source that provides reasonable suspicion that an offender has used, possessed, or possesses a controlled substance/alcohol.
  2. Documentation by staff that indicates an offender's behavior/appearance has demonstrated that s/he may be under the influence of a controlled substance/alcohol.
  3. Suspicious odor of controlled substance/alcohol is detected on an offender or at any location where the offender is present.
  4. When a canine officer observes a behavior change in his/her dog that signifies suspicion of the presence of a drug. The offender(s) residing in the suspected area will be given a drug test.
  5. Documentation from medical staff that an offender displayed symptoms of being under the influence of a controlled substance/alcohol.
  6. Documented, physical evidence of substance use (e.g., injection sites).
  7. The offender is involved in an on-the-job accident, unsafe practices, or violent behavior.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p><b>POLICY</b></p>	APPLICABILITY <b>PRISON/WORK RELEASE/FIELD</b> OFFENDER/SPANISH MANUALS		
	REVISION DATE 10/4/10	PAGE NUMBER 6 of 11	NUMBER <b>DOC 420.380</b>
	TITLE <b>DRUG/ALCOHOL TESTING</b>		

8. Controlled substance/drug related paraphernalia is found during a search of an offender or his/her living or common area.

#### VI. Specimen Collection


A. Refusal to submit to a drug/alcohol test will result in an infraction/violation. [5A-09]

B. [5A-09] Urine Collection

1. Staff trained in the specimen collecting process, of the same sex as the offender, will directly observe the urine collection. Offenders and staff who are not directly involved in the collection procedure will not be permitted in the area where the specimen is provided.
  - a. Offenders receiving kidney dialysis will not be required to provide urine specimens.
    - 1) In facilities with on-site health care, the facility Health Care Manager will be consulted for alternative testing. For all other offenders, the CCS/CCO will consult with the Chief Medical Officer at Headquarters regarding alternative testing.
2. Urine specimens will be collected in a secure, private, and sanitary area. There will be no unsupervised access to water fountains, faucets, soap, cleaning agents, or other materials which may dilute or alter the specimen.
3. The offender will be allowed up to one hour to provide a urine specimen, or up to 2 hours if there is a prior established medical issue on file. The offender will be allowed no more than one 8 ounce cup of water.
4. Adulterant strips will be used on a random basis with the instant on-site tests or when there is suspicion that a specimen may be adulterated. A positive reading must be confirmed through the lab.
5. Procedures for specimen collection are outlined in Processing Specimens - Chain of Custody Assurance (Attachment 4), Specimen Collection - Urine (Attachment 5), and Testing Procedures - Instant On-site - Urine (Attachment 7).

C. Oral Fluid Collection

1. Staff trained in the oral fluid collection process will directly observe the collection of the oral fluid specimen.

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p><b>POLICY</b></p>	APPLICABILITY <b>PRISON/WORK RELEASE/FIELD</b> OFFENDER/SPANISH MANUALS		
	REVISION DATE 10/4/10	PAGE NUMBER 7 of 11	NUMBER <b>DOC 420.380</b>
	TITLE <b>DRUG/ALCOHOL TESTING</b>		

2. Procedures for specimen collection are outlined in Processing Specimens - Chain of Custody Assurance (Attachment 4) and Testing Procedures - Instant On-site - Oral Fluid (Attachment 6).

VII. Breath Alcohol Screening Tests

- A. Refusal to submit to breath alcohol testing will result in an infraction/violation.
- B. Only Department authorized breathalyzer instruments will be used.
- C. Breath alcohol testing will be conducted by a qualified tester in an area free of other offenders.
- D. Testing procedures will be consistent with manufacturer's recommendations as identified in Breathalyzer Instrument Operation Guidelines (Attachment 2).
- E. Maintenance records of testing equipment will be the responsibility of the site Drug Testing Coordinator/CCS or designee.
  1. An accuracy check will be conducted monthly per Accuracy Check/Calibration (Attachment 1).
  2. A calibration will be conducted by certified, trained personnel when the instrument does not register accurately. Calibration will be conducted at least every 6 months. The Prisons Division will maintain a current list of certified personnel authorized to conduct instrument calibration.
  3. All accuracy checks and calibrations will be documented on DOC 14-311 Accuracy/Calibration Check Record. This record will be kept with the instrument and accessible for auditing purposes.
- F. The Drug Testing Coordinator/designee will ensure that all testing and results for alcohol are logged on DOC 14-037 Instant On-Site Drug Testing and Breathalyzer Data Collection Sheet and reported monthly to the contracted laboratory.
- G. A positive test reading of .020 or higher will be referred appropriately per the Response to Positive Test section of this policy.

VIII. [5A-09] Specimen Storage and Transfer

- A. All specimens will be processed, stored, and secured per vendor requirements and Processing Specimens - Chain of Custody Assurance (Attachment 4).



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
10/4/10

PAGE NUMBER  
8 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

1. Specimens not transported within 24 hours of collection must be stored in a secured receptacle.
- B. Handling and transportation of specimens should be documented on DOC 14-038 Drug Test Log Chain of Custody Assurance. The number of individuals handling the specimens must be kept to a minimum.
- C. Department responsibility for the chain of custody is only complete when the:
  1. Contracted courier picks up the samples and either documents pick up electronically or leaves a signed receipt identifying the number of sample bags and the time and date of pick up, or
  2. Specimens are transferred to the U.S. Postal Service or sent by another outside courier.
- D. Log sheets, receipts from couriers, and other offender drug/alcohol testing records must be secured and retained per the Records Retention Schedule.

### **IX. Test Results**

- A. If the test result is negative, the tester will inform the offender of the result and dispose of any sample collected.
- B. If the test result is positive, the tester will provide the offender an opportunity to admit use.
  1. If the offender admits use, s/he will be presented with DOC 14-021 Drug Use Admission for signature. If the offender signs the form, the admission will be entered in the offender's electronic file and no further testing will be required.
  2. If the offender contests the result or refuses to sign the admission, the sample will be submitted to the contracted laboratory for confirmation.
- C. All other positive drug tests and all EFV-related tests will be confirmed through Gas Chromatography Mass Spectrometry (GC/MS) and Liquid Chromatography Mass Spectrometry (LCMS) by the contracted lab.
  1. The standard drug tests and authorized confirmation levels for all offenders are:
    - a. Amphetamines/Methamphetamines – 500 Ng/ml,
    - b. Tetrahydrocannabinol (THC) – 6 Ng/ml,
    - c. Cocaine Metabolite – 150 Ng/ml,



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
10/4/10

PAGE NUMBER  
9 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

- d. Opiates – 150 Ng/ml, and
  - e. Benzodiazepines – 100 Ng/ml, and
  - f. Oxycodone – 100 Ng/ml.
- 2. If there is suspicion that a substance other than those noted is being used, the following tests may be ordered with justification and authorization from the Superintendent/CCS or designee:
  - a. Barbiturates,
  - b. Methadone,
  - c. Methaqualone,
  - d. Propoxyphene,
  - e. Ethanol,
  - f. Phencyclidine, and
  - g. Ecstasy.
- 3. The contracted laboratory will test for the following adulterants: nitrites, creatinine, pH, and specific gravity.
  - a. When the nitrite is positive or the pH is out of range, the specimen is consistent with an adulterated specimen and the offender will be subject to an infraction/violation.
  - b. When the creatinine and specific gravity levels are both out of range, the specimen is consistent with a diluted specimen and the offender may be charged with an infraction/violation.
- 4. Specimen samples tested as positive will be frozen and retained for at least 6 months after the results have been reported to the Department. At the request of the Department, individual samples will be kept until final disposition of any court/Department action.
- D. [5A-09] All test results should be documented in the offender's electronic file by designated Department staff.
  - 1. In Prisons, the results must be documented prior to a transfer or release.
- E. A copy of a confirmed positive test result will be forwarded to the central/offender file and to the assigned chemical dependency professional, if applicable.
- X. Response to Positive Test
  - A. In Prisons, upon receipt of a positive confirmation, the Drug Testing Coordinator will ask medical staff to complete DOC 14-036 Medication Certification to



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
10/4/10

PAGE NUMBER  
10 of 11

NUMBER  
**DOC 420.380**


## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

determine any possible cross-reactions between any prescribed medications the offender may be taking. In Work Releases and in the community, staff will submit verification of any prescribed medication with the test sample.

- B. [5A-09] Positive tests will be addressed by initiating graduated sanctions through the disciplinary process. Prisons will refer to the Prison Sanctioning Guidelines attached to DOC 320.150 Disciplinary Sanctions, and Work Releases will refer to the Disciplinary Sanction Table attached to DOC 460.135 Disciplinary Procedures for Work Release.
- C. An offender on community supervision whose health care professional has recommended Marinol/Dronabinol (medicinal marijuana) will not be in violation if s/he tests positive for THC. The offender must provide his/her CCO a copy of the health care professional's recommendation.
1. An offender whose health care professional has recommended medicinal marijuana will notify his/her CCO, who will provide the offender DOC 14-053 Medicinal Use of Marijuana Verification and DOC 13-035 Authorization for Disclosure of Health Information.
    - a. Within 2 weeks, the offender and his/her health care professional will complete the forms and submit them to the Chief Medical Officer/designee for review.
  2. Once the Chief Medical Officer/designee has approved/denied the request, the Assistant Secretary for Community Corrections will notify the offender and the CCO of the decision.
  3. The offender may appeal a denial to the Assistant Secretary for Community Corrections, who will approve or deny the appeal in conjunction with the Assistant Secretary for Government, Community Relations and Regulatory Compliance.
    - a. The appeal must be submitted in writing within 15 business days of written denial notice.
    - b. The offender's risk level classification and criminal history will be taken into consideration as part of this review.
    - c. The Assistant Secretary will provide a written response to the offender within 30 business days of the decision.
  4. The offender should not receive any violation related to medicinal marijuana use during this review process.



 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p><b>POLICY</b></p>	APPLICABILITY <b>PRISON/WORK RELEASE/FIELD</b> OFFENDER/SPANISH MANUALS		
	REVISION DATE 10/4/10	PAGE NUMBER 11 of 11	NUMBER <b>DOC 420.380</b>
	TITLE <b>DRUG/ALCOHOL TESTING</b>		

5. If the offender is approved to use medicinal leaf marijuana, the CCO will add a condition of supervision that the offender will not operate a motor vehicle while using.
  6. If the offender is denied use of medicinal marijuana, s/he will be instructed by his/her CCO to discontinue use. The offender will be:
    - a. Required to submit to a UA and given 30 days for the THC levels to decrease.
    - b. Violated if the levels do not decrease. The offender should not be violated retroactively.
- D. [5A-09] Positive drug tests for offenders in DOSA Community Residential Treatment Program will be reported to the court with a recommended sanction per the Graduated Sanction/Violation Response Guide attached to DOC 460.130 Violations and Hearings and the Disciplinary Sanction Table attached to DOC 460.135 Disciplinary Procedures for Work Release.

#### DEFINITIONS:

Words/terms appearing in this policy may be defined in the glossary section of the Policy Manual.

#### ATTACHMENTS:

Accuracy Check/Calibration (Attachment 1)  
Breathalyzer Instrument Operation Guidelines (Attachment 2)  
Drug Testing Methods and Occasions of Use (Attachment 3)  
Processing Specimens - Chain of Custody Assurance (Attachment 4)  
Specimen Collection - Urine (Attachment 5)  
Testing Procedures - Instant On-site - Oral Fluid (Attachment 6)  
Testing Procedures - Instant On-site - Urine (Attachment 7)

#### DOC FORMS:

DOC 13-035 Authorization for Disclosure of Health Information  
DOC 14-002 Consent for Drug/Alcohol Testing - Total and Partial Confinement  
DOC 14-021 Drug Use Admission  
DOC 14-035 Consent for Drug/Alcohol Testing - Field  
DOC 14-036 Medication Certification  
DOC 14-037 Instant On-Site Drug Testing and Breathalyzer Data Collection Sheet  
DOC 14-038 Drug Test Log Chain of Custody Assurance  
DOC 14-053 Medicinal Use of Marijuana Verification  
DOC 14-311 Accuracy/Calibration Check Record

## **ACCURACY CHECK/CALIBRATION**

### **ACCURACY CHECK**

An accuracy check is a simple process that can be conducted by any trained Department staff. Each site that will be using the Alco-Sensor to test for alcohol consumption will need to have ready access to a dry-gas tank and regulator.

### **CALIBRATION**

Calibrations can be conducted through one of the following procedure options:

#### **Mutual courtesy agreement with another agency**

1. Each facility/office can approach and enter into a courtesy agreement with their local law enforcement agency (e.g., county Sheriff, Washington State Patrol, city police department) to calibrate their instrument.
2. The operating technician will need to make an entry on the DOC 14-311 Accuracy/Calibration Check Record that documents the test results and accuracy checks, as well as the calibration occurrences.

#### **Contract agreement with Bostec, Inc.**

1. The Department has entered into a contract with Bostec, Inc. to calibrate and service all models by Intoximeters, Inc. for the Department.

#### **Trained Department staff**

1. The Prisons Division will maintain a list of trained and certified technicians.
2. Each trained Department operating technician will need to be furnished with an alcohol tank and valve.
3. The technicians will be responsible for the accuracy readings of the instruments they calibrate and may be called to court to declare they have had the required training.
4. The technicians will document the readings of the calibration, including date and signature. The documentation will stay with the individual instrument.

## **BREATHALYZER INSTRUMENT OPERATION GUIDELINES**

### **ALCO-SENSOR III**

1. No alcohol for 15 minutes before testing. No smoking within 3 minutes of testing.
2. Check temperature display – should be 20-36 degrees Celsius.
3. Press the SET button.
4. Press and hold the READ button.
5. Confirm display goes down to 0.000 in approximately 10-15 seconds. If it does not, repeat steps 4 and 5.
6. Attach plastic mouthpiece to top of instrument. The offender will blow into the long end.
7. Press the SET button.
8. Have offender blow 10-15 seconds. This needs to be a deep lung breath. Be sure to point the instrument away from you.
9. Press the READ button for the last 4-5 seconds while the offender is blowing.
10. Keep the READ button pressed until a “peak” reading is obtained. This can take up to 45 seconds.
11. Remove and discard mouthpiece.
12. Store instrument with the SET button depressed.

### **Accuracy Check Procedures:**

1. Obtain standard reference values from the gas tank label. If not at sea level, get the value from the chart on the tank.
2. Verify the PBT temperature is between 20-36 degrees Celsius.
3. Press the SET button if not already depressed.
4. Press and hold the READ button.
5. It should read 0.003 or less within 10 seconds. If it does not, press SET, wait one minute, and then press and hold the READ button again. If it still does not read 0.003, the instrument needs repair.
6. Attach the mouthpiece to the gas standard source (i.e., tank).
7. Press the regulator control button and allow 3-5 seconds of gas flow.
8. Press and hold the READ button while the sample is being provided.
  - a. If it takes more than 60 seconds to stabilize, the fuel cell should be replaced.

## **BREATHALYZER INSTRUMENT OPERATION GUIDELINES**

9. Observe the digital reading to determine if acceptably accurate:
  - a. If results are within 0.005g/210L from the reference value for the gas standard, the instrument is properly calibrated and acceptably accurate.
  - b. If the results are not within acceptable limits, the instrument needs to be calibrated.
10. Complete DOC 14-311 Accuracy/Calibration Check Record.

### **ALCO-SENSOR IV**

1. Insert mouthpiece – this will turn the unit on.
2. Once mouthpiece has been properly inserted, the unit's temperature should read between 10-40 degrees Celsius. If the unit's temperature is not within this range, remove mouthpiece and take steps to bring temperature to within the operating range.
3. Unit will prompt to press the SET button. Follow any prompts that the unit may give (e.g., "WAIT").
4. When unit displays BLNK, it is running a blank test. Either a zero (0) or "VOID" will be displayed. If VOID is displayed, the instrument is not clear of alcohol. Start over by depressing the SET button again.
5. Once zero (0) is displayed, if the instrument is ready to test it will display "TEST".
6. Instruct the offender to take a deep breath, hold it, and then blow steadily through the mouthpiece for as long as s/he can. A (+) will appear indicating that the instrument is sensing the breath flow. If a (+) does not appear, stop the offender and instruct him/her to blow with more force.
7. When the offender has blown a minimum volume of breath, a (++) appears. The sample will be taken ONLY if the condition has been met and when the breath flow diminishes.
8. As soon as a successful breath sample has been taken, the busy signal (</>) is displayed to indicate that the instrument is analyzing the breath sample. A sample with no alcohol will result in a zero (0) reading almost instantly. A breath sample containing alcohol will register a 3-digit display in about 10-40 seconds. The final reading will be accompanied by a 3-tone beep.
9. Press the SET button and the RELEASE button to eject the mouthpiece.
10. The Alco-Sensor IV should remain idle for at least one minute following a positive test reading.

## **BREATHALYZER INSTRUMENT OPERATION GUIDELINES**

### **Accuracy Check Procedures:**

1. Obtain standard reference values from the gas tank label. If not at sea level, get the value from the chart on the tank.
2. Remove battery cover from Alco-Sensor IV.
3. Verify temperature is between 23-27 degrees Celsius. If device is too cold, eject mouthpiece and place the unit next to your body. If too warm, place in a cooler place.
4. Insert the mouthpiece.
5. Note the 3-digit gas standard value.
6. Attach the mouthpiece to the regulator hose.
7. When prompted by the instrument, run the gas through the mouthpiece for 7 seconds. On the 6<sup>th</sup> second, press the MANUAL button to sample the gas.
8. Confirm result is within 0.10 of the gas standard target value.
9. Complete DOC 14-311 Accuracy/Calibration Check Record.
10. Replace battery cover.

### **ALCO-SENSOR FST**

1. Nothing in mouth for 15 minutes before testing.
2. Attach a new mouthpiece.
3. The standard operating temperature should be between 0-50 degrees Celsius. If the temperature is outside this range, the instrument will indicate this condition and power itself off. If this occurs, take steps to bring temperature to within the operating range.
4. When the display shows the icon of a person's head flashing and/or BLO is displayed, instruct the offender to take a deep breath, hold it, and then blow steadily through the mouthpiece for as long as s/he can.
5. The icon of the head will stop flashing and a dash will appear to the right of the head. This indicates that the instrument senses sufficient breath flow.
6. Once 3 dashes appear, an automatic sample will be taken.
7. As soon as a successful breath sample has been captured, a series of dashes will scroll across the display. At the end of the analysis, a result will be displayed.
8. The result will be displayed for 15 seconds before the instrument will power itself off.
9. To initiate a subsequent test, press the "on" button to restart the instrument.

## DRUG TESTING METHODS AND OCCASIONS OF USE

Systems	When to Use	Confirmation
<b>Urinalysis - On-Site</b>  <i>Order Rapid Drug Screen through Regional Business Office Purchasing Staff</i>	<ul style="list-style-type: none"> <li>As outlined per policy</li> </ul>	<ul style="list-style-type: none"> <li>Send urine specimen to Sterling Reference Lab for GC/MS confirmation on:                             <ul style="list-style-type: none"> <li>All EFV-related tests</li> <li>Other tests, on positive screened drug(s), unless offender signs DOC 14-021 Drug Use Admission admitting his/her use of drug(s)</li> </ul> </li> <li>Indicate on the drug test requisition that the sample is an on-site test kit being submitted for confirmation</li> </ul>
<b>Oral Fluids</b>  <i>Order Oralsat 6 through Regional Business Office Purchasing Staff</i>	<ul style="list-style-type: none"> <li>When there is no same gender officer available</li> <li>Documented medical issues that may preclude urination</li> <li>Imminent threat to public safety</li> <li>Marijuana is <u>not</u> suspected</li> <li>Record of suspicious flushing or adulteration of urine</li> <li>At the collector's discretion when the offender is unable to provide a urine sample within the allotted time</li> </ul>	<ul style="list-style-type: none"> <li>Send oral fluid kit on positive tests for GC/MS confirmation to Sterling Reference Lab, unless offender signs DOC 14-021 Drug Use Admission admitting his/her use of drug(s)</li> </ul>

## **PROCESSING SPECIMENS CHAIN OF CUSTODY ASSURANCE**

To ensure chain of custody after collecting the specimen, the collector will:

1. Ensure the identification numbers on the adhesive label and the laboratory requisition form are the same.
2. Completely fill out the requisition form. Ensure all prescribed and Over the Counter (OTC) medications the offender is currently taking are listed on the requisition form. Have the offender initial the form.
3. Ensure that the container lid is secure.
  - a. For urine tests, apply the adhesive label to the specimen cup.
  - b. For oral fluid tests, ensure the cap is secure over the absorbent pad.
4. Have the offender initial the tamper evident tape and place the tape over the container lid in the offender's presence.
5. Ensure the specimen is placed in the sealable plastic bag along with the moisture-absorbent packet.
6. Place the original requisition form in the outer pouch and seal the bag.
7. Ensure the bag remains in his/her direct visual supervision until secured in the designated location.
8. To send specimens to the lab:
  - a. In Prison, place all bagged specimens in the courier bag and secure the bag in the designated location until courier pick-up.
  - b. In Work Release and in the community, place all bagged specimens in the mailer provided and send to Sterling Reference Lab through the U.S. Postal Service.
9. Complete DOC 14-038 Drug Test Log Chain of Custody Assurance with the names and numbers of all offender specimens in the lot that will be sent to the contracted laboratory.
  - a. For oral fluid test kits, enter the information for those test kits that will be confirmed by Sterling Reference Lab.
10. Retain DOC 14-038 Drug Test Log Chain of Custody Assurance.
  - a. In Prison, attach all receipts left by couriers to the respective DOC 14-038 Drug Test Log Chain of Custody Assurance.

## **SPECIMEN COLLECTION URINE**

1. In Prison, the offender must sign DOC 14-002 Consent for Drug/Alcohol Testing - Total and Partial Confinement each time s/he is given a urinalysis test.
2. In Work Release, the offender must sign DOC 14-002 Consent for Drug/Alcohol Testing - Total and Partial Confinement at the time of intake.
3. In the community, the offender must sign DOC 14-035 Consent for Drug/Alcohol Testing - Field at the time of intake.
4. Check the offender's identification to verify identity, name, and DOC number.
5. Inform the offender, prior to the specimen collection, that refusal/failure to provide a specimen within one hour will result in an infraction/violation.
6. Ensure the contractor's requisition form is completely filled out.
7. Facilitate the urine collection in a secure, private, and sanitary area. There will be no unsupervised access to water fountains, faucets, soap, cleaning agents, or other materials which can dilute or alter the specimen.
8. Staff will always wear protective gloves during the observed collection process.
9. The offender will be allowed up to one hour to provide a urine specimen. The offender may be allowed up to 2 hours to provide a sample only if there is a prior established medical issue on file. During this process, the offender may not ingest more than 8 ounces of water. The staff will place the container in a secured area until the offender is able to provide the specimen.
10. Staff will ensure the offender thoroughly washes his/her hands without soap and dries them with materials staff provides, or the offender may wear protective gloves provided by staff.
11. Facilities are not required to perform strip searches prior to urine collection. Prisons performing strip searches will follow DOC 420.310 Searches of Offenders.
12. In Prisons where strip searches are not conducted, and at Work Releases and the community, all offenders will remove any jacket or coat, lift their shirt to expose their midriff, and roll up long sleeves.
13. Prior to providing the sample, male offenders will allow their pants/jeans and underwear to fall to their ankles for visual observation of the container and the offender's hands/genital area.
14. Female offenders will provide a urine sample into a "hat" provided by Department staff.
15. Staff will inspect the offender's hands and fingernails for possible contaminants prior to providing the specimen.
16. Staff will hand the offender a specimen container and allow him/her to visually inspect it.



## **SPECIMEN COLLECTION URINE**

17. Staff will instruct the offender to provide a specimen in one collection that is at least 30 cc/ml.
18. The offender will provide a specimen in one collection that is at least 30 cc/ml.
19. Staff will verify that the temperature of the specimen is within acceptable range (90 - 100 Fahrenheit) as indicated by the temperature strip on the specimen bottle. If the temperature registers out of range, the sample will be immediately discarded and a second observed specimen will be collected.
20. If the offender is unable to produce a urine specimen within the allotted time, an oral fluid may be collected at the collector's discretion.

## **TESTING PROCEDURES INSTANT ON-SITE - ORAL FLUID**

1. Prior to opening the foil packet, verify the expiration date. Do not use beyond the expiration date.
2. Open the packet containing the test kit in full view of the offender. A moisture absorbent packet is enclosed with the test kit. In Prisons, this may be a safety issue. Handle according to facility protocol.
3. Make sure the offender does not put anything into his/her mouth for at least 10 minutes prior to collecting the saliva sample.
4. Remove the device and collection swab from the foil pouch. Do not use if the pouch is not intact. Verify that the test slide "C" has not been pushed down into the device. Ensure that the feet on the tabs are resting on the top of the device.
5. Keeping the device on a flat surface, remove the blue instruction label covering the wells labeled "A" and "B". Insert the handle of the collection swab into each of the "A" wells, pushing down completely until the ring on the swab is level with the top of the well.
6. Keeping the device on a flat surface, gently agitate the buffer within the device by moving it from side to side for about 3 seconds.
7. Instruct the offender to open the silver and clear plastic pouch that contains the collection swab. Then instruct the offender to place the sponge between the cheek and gum and swab for at least one minute on each side of the mouth, without chewing or sucking on the sponge.
8. Observe the offender during the collection process. If after 2 minutes the sponge is not fully expanded to completely cover the exposed rod, continue the sample collection process until the sponge is fully expanded.
9. Have the offender remove the collector from his/her mouth and hand it to you. Do not allow the offender to suck on the sponge on removal.
10. Gently drop the swab into well "B" allowing it to settle vertically. Leave the collection swab in place for at least 5 seconds. After waiting 5 seconds, the collection swab can be removed and the plastic cover replaced over the sponge.
11. Keeping the device on a flat surface, agitate gently from side to side for at least 3 seconds.
12. Set a timer for 8 minutes. This is the incubation phase, which should be a minimum of 8 minutes.
13. After the incubation period, push down the test slide "C" into the device by pressing in on the side tabs and pushing the test slide down until it stops. This starts the testing phase.
14. The test results may be interpreted 3-8 minutes after the test slide was pushed down into the device.

## **TESTING PROCEDURES INSTANT ON-SITE - ORAL FLUID**

15. If at 3 minutes all lines have formed (i.e., both test valid lines and all drug lines), the test results may be interpreted as Negative.
16. If one or more of the drug lines has not formed, wait a full 8 minutes to interpret the results.
17. Band intensity is not important when interpreting test results. Incomplete or faint bands are considered bands.
18. Make sure the test is valid by checking the TEST VALID window.
  - a. If both bands are visible, the test is VALID.
  - b. If one or both bands are NOT visible, the test is NOT VALID.
    - Repeat test with a new kit.
19. Read results:

### **Negative results**

- a. The presence of the reddish-purple Test Valid line AND a reddish-purple line adjacent to the particular drug.
- b. Any line, without regard to intensity, color, or size, is a line that indicates a negative result for that drug.
- c. If the reading(s) is Negative, the process is complete. Discard the testing instrument in normal waste depository. No further precautionary measures are necessary.

### **Positive results**

- a. The presence of the reddish-purple Test Valid line and NO line adjacent to the particular drug.
- b. All positive screens will be automatically confirmed using GC/MS and LCMS, unless the offender signs DOC 14-021 Drug Use Admission admitting use. The collection swab will be sent to Sterling Reference Lab as outlined in Processing Specimens - Chain of Custody Assurance (Attachment 4).

## TESTING PROCEDURES INSTANT ON-SITE - URINE

1. Verify the expiration date on the foil pouch containing the test kit. Do not use beyond the expiration date.
2. Open packet with collection container in the offender's presence just prior to sample collection.
3. Instruct offender to provide sample. Sample level must be above minimum fill line printed on the cup.
4. Verify specimen temperature (green dot). An acceptable specimen is between 90-100 degrees Fahrenheit (32-38 degrees Celsius).
5. Note any discoloration or unusual appearance/odor.
6. Set the specimen cup on a flat surface.
7. Immediately cover with tamper-evident seal provided by American Bio Medica Corporation (ABMC).
8. RESULTS

Results may be interpreted once the control lines have formed and the background clears (3-5 minutes).

Control line: Test valid

No control line: Test invalid

Test line: Test negative

No test line: Test preliminary positive

9. To record results:
  - a. In Prisons, enter **all results** on DOC 14-037 Instant On-Site Drug Testing and Breathalyzer Data Collection Sheet following the instructions printed on the top of the form and document in the offender's electronic file.
  - b. In Work Release and in the community, complete Sterling Reference Laboratories' On-Site Data Capture form with offender demographic information. Attach the ID sticker from the form to the cup. Record results of ABMC Instant Screening Devices on the form and document in the offender's electronic file.
10. If a confirmatory test is required, complete Sterling Reference Laboratories' Laboratory Confirmation Testing form with offender demographic information. Attach the ID sticker from the form and follow Processing Specimens - Chain of Custody Assurance (Attachment 4).
11. Dispose of urine specimens according to established protocols. Note: Urine is not a bio-hazard.

# Item 10

DOC Policy 420.380 in effect  
December 2012



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
1 of 11

NUMBER  
**DOC 420.380**

## POLICY

TITLE

**DRUG/ALCOHOL TESTING**

### REVIEW/REVISION HISTORY:

Effective: 8/31/98  
Revised: 8/20/99  
Revised: 5/27/03  
Revised: 1/21/05  
Revised: 3/26/07 AB 07-008  
Revised: 12/5/07  
Revised: 12/18/07 AB 07-039  
Revised: 10/4/10  
Revised: 9/24/12

### SUMMARY OF REVISION/REVIEW:

Major changes, including moving language on medical marijuana to new policy DOC 620.380  
Offender Medical Marijuana Use. Read carefully!

### APPROVED:

**BERNARD WARNER**, Secretary  
Department of Corrections

8/14/12

Date Signed



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
2 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

### **REFERENCES:**

DOC 100.100 is hereby incorporated into this policy; WAC 137-28; WAC 137-56; ACA 5A-09; DOC 320.150 Disciplinary Sanctions; DOC 420.310 Searches of Offenders; DOC 420.365 Evidence Management for Work Release; DOC 420.375 Contraband and Evidence Handling; DOC 420.390 Arrest and Search; DOC 420.395 Evidence/Property Procedures for Field; DOC 460.000 Disciplinary Process for Prisons; DOC 460.130 Violations and Hearings; DOC 460.135 Disciplinary Procedures for Work Release; DOC 590.100 Extended Family Visiting; DOC 620.380 Offender Medical Marijuana Use; DOC 670.500 Chemical Dependency Treatment Services; DOC 670.655 Special Drug Offender Sentencing Alternative; Records Retention Schedule

### **POLICY:**

- I. The Department will use drug testing as a management tool to enhance supervision, function as a treatment tool, and deter against drug use.

### **DIRECTIVE:**

- I. Responsibilities
  - A. Employees/contract staff will only use drug testing options that are approved by the Department per the guidelines in Attachment 1.
  - B. Each Superintendent/Field Administrator will ensure drug and alcohol testing meets the expectations of this policy. S/he will appoint a Drug Testing Coordinator to coordinate, monitor, and provide the services of the drug testing program.
  - C. The Headquarters Prisons and Community Corrections designees will coordinate training for Drug Testing Coordinators and implement and follow a quality assurance program.
  - D. Drug Testing Coordinators will train employees and contract staff involved in any portion of the drug and alcohol testing process. Training will cover the use of all approved drug/alcohol screening instruments.
- II. Testing in Prison
  - A. Employees will conduct drug/alcohol testing using either the off-site lab screening and testing or the approved on-site testing kit. Offenders must sign DOC 14-002 Consent for Drug/Alcohol Testing - Total and Partial Confinement each time they are given a drug/alcohol test.



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
3 of 11

NUMBER  
**DOC 420.380**

**POLICY**

TITLE

**DRUG/ALCOHOL TESTING**

- B. Scheduled testing will be conducted before offenders are transferred to a minimum facility or Work Release.
1. Upon receipt of a Notice of Transfer manifest, the Correctional Records Supervisor will notify the Drug Testing Coordinator/designee to schedule a urinalysis (UA). The Drug Testing Coordinator/designee will use an instant on-site test or other drug screen no more than 48 hours and no less than 24 hours prior to the date of transfer.
  2. If the test result is positive, the Drug Testing Coordinator/designee will notify the appropriate employees, and the transfer will be delayed/ cancelled pending the outcome of the disciplinary hearing.
- C. Per DOC 590.100 Extended Family Visiting, drug/alcohol testing will be conducted no more than 24 hours before and after Extended Family Visits (EFVs) and may be conducted during the visits. If a test result is positive, appropriate employees will be notified. The result may be confirmed by the contracted lab if determined necessary or appropriate.
1. Prior to the EFV, the offender will submit to an instant on-site test. If the test result is positive or shows as diluted, the visit will be suspended pending a disciplinary hearing.
  2. During the EFV, the offender may be required to submit to random instant on-site tests. If the test result is positive or shows as diluted, the visit will be terminated.
  3. Upon conclusion of the EFV, a drug/alcohol test will be conducted at the time of the routine strip search.
- D. Employees may conduct a breath alcohol test when they have reason to believe that an offender has used, possessed, or possesses substances containing alcohol.
- E. Offenders participating in chemical dependency treatment will be subject to drug/ alcohol testing:
1. Upon admission to treatment, and
  2. Randomly, or for cause, at the treatment provider/Counselor's discretion.
- F. A minimum of 2 percent of the average daily population at each Prison will be randomly tested for drugs and alcohol using either the instant on-site testing kit or off-site screening and confirmation through the contracted lab. By the 5<sup>th</sup> of





STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
4 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

each month, the Performance Unit will email the facility Drug Testing Coordinator a list of offenders to be tested.

G. An offender may also be tested:


1. When s/he returns from an absence (e.g., court appearance, outside work crew, outside medical appointment).
2. If s/he has a documented history of drug/alcohol related disciplinary reports or violation behavior.

### III. Testing in Work Release

- A. Employees/contract staff will conduct drug/alcohol testing using an instant on-site test.
- B. Offenders will be tested within 24 hours of entering Work Release directly from the community. Offenders must sign DOC 14-002 Consent for Drug/Alcohol Testing - Total and Partial Confinement at the time of intake.
- C. Offenders will be tested according to their Custody Facility Plan.
- D. Employees/contract staff may conduct a breath alcohol test when they have reason to believe that an offender has used, possessed, or possesses substances containing alcohol.
- E. Offenders participating in chemical dependency treatment will be subject to drug/alcohol testing:
1. Upon admission to treatment, and
  2. Randomly, or for cause, at the treatment provider/Community Correction Officer (CCO)'s discretion.
- F. An offender may also be tested:
1. When s/he returns from an absence from the facility (e.g., employment, court appearance, outside work crew, outside medical appointment).
  2. If s/he has a documented history of drug/alcohol related disciplinary reports or violation behavior.

### IV. Testing in the Community

- A. Employees will conduct drug/alcohol testing using an instant on-site test. Lab confirmation is not required, but may be approved by the Community Corrections

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p><b>POLICY</b></p>	APPLICABILITY <b>PRISON/WORK RELEASE/FIELD</b> OFFENDER/SPANISH MANUALS		
	REVISION DATE 9/24/12	PAGE NUMBER 5 of 11	NUMBER <b>DOC 420.380</b>
	TITLE <b>DRUG/ALCOHOL TESTING</b>		

Supervisor (CCS) in limited cases to monitor decreasing levels of substance, confirm prescribed usage, or determine if an offender is masking prohibited use.

- B. Offenders that have a prohibition not to use drugs/alcohol or a condition to submit to drug testing/breathalyzer, or who have affirmative conduct in this area, will be tested. Offenders must sign DOC 14-035 Consent for Drug/Alcohol Testing - Field at the time the condition is imposed.
  - 1. Employees will conduct drug/alcohol testing for offenders with face-to-face contacts per the contact standards, or per court imposed conditions, prohibitions, affirmative conduct, or the Offender Supervision Plan:
    - a. The first test will be conducted within 30 days of intake.
    - b. High Risk Violent and High Risk Non-Violent offenders will be tested monthly, which may be reduced to quarterly after 3 consecutive negative tests.
      - 1) Violation behavior will result in a return to monthly testing.
    - c. Moderate and Low Risk offenders will be tested quarterly.
- C. Drug Offender Sentencing Alternative (DOSA) offenders in community based residential treatment will be tested at the treatment provider's discretion.
  - 1. Employees will conduct testing on all DOSA offenders on release from Prison or residential treatment or when community supervision begins.
  - 2. Employees will conduct testing on DOSA offenders who fail to report for a scheduled treatment appointment.
  - 3. All DOSA offenders will be required to submit to weekly drug testing for the first 3 months following release from Prison or residential treatment. If test results are negative, testing will be conducted as required for offenders with face-to-face contacts per the contact standards, or per court imposed conditions, prohibitions, affirmative conduct, or the Offender Supervision Plan.
- V. Testing for Cause
  - A. In Prisons and Work Releases, the Superintendent/facility CCS will identify employees/contract staff authorized to require tests for cause reasons.
  - B. In the community, CCOs may test offenders for cause.



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
6 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

C. Cause for testing will include, but will not be limited to:

1. Direct observation by an employee/contract staff or reliable source that provides reasonable suspicion that an offender has used, possessed, or possesses a drug/alcohol.
2. When a canine officer observes a behavior change in his/her dog that signifies suspicion of the presence of a drug. All offenders in the suspected area will be tested.
3. The offender is involved in an on-the-job accident, unsafe practices, or violent behavior.

## VI. Substances

A. The standard on-site drug test specimen cup and additional testing strips detect:

1. Amphetamine/Methamphetamine,
2. Tetrahydrocannabinol (THC),
3. Cocaine Metabolite,
4. Opiate,
5. Benzodiazepine,
6. Phencyclidine (PCP),
7. Suboxone, and
8. Oxycodone.

B. Tests for the following substances may be conducted/ordered with justification and authorization from the Superintendent/CCS or designee:

1. Barbiturate,
2. Methadone,
3. Propoxyphene,
4. Ecstasy,
5. Bath salts, and
6. Spice.

## VII. Specimen Collection

- A. An offender's refusal to submit to a urine or oral fluid specimen collection for a drug/alcohol test will be treated as a positive test result. [5A-09]
- B. Employees/contract staff will ensure that all testing and results are logged on DOC 14-037 Instant On-Site Drug Testing and Breathalyzer Data Collection Sheet or approved equivalent.



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
7 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE

### **DRUG/ALCOHOL TESTING**

#### **C. Urine Collection**

1. Employees/contract staff trained in the specimen collecting process will collect the specimen. The tester will be the same sex as the offender. Offenders who are not directly involved in the collection will not be permitted in the collection area.
  - a. Offenders receiving kidney dialysis will not be required to provide urine specimens and may be tested using an oral fluid swab.
    - 1) In facilities with on-site health care, the tester will consult the facility Health Care Manager for alternative testing.
    - 2) For all other offenders, the CCS/CCO will consult with the Chief Medical Officer at Headquarters regarding alternative testing.
  - b. If there is no same sex employee/contract staff available to collect the specimen, the offender will be tested using an oral fluid swab.
2. The tester may use adulterant strips with the instant on-site tests on a random basis or when there is suspicion that a specimen is adulterated.
3. The tester will follow the procedures for specimen collection outlined in Processing Specimens for Contracted Lab - Chain of Custody Assurance (Attachment 2) and Testing Procedures - Urine (Attachment 5).

#### **D. Oral Fluid Collection**

1. Employees/contract staff trained in the oral fluid collection process will collect the specimen.
2. The tester will follow the procedures for specimen collection outlined in Processing Specimens for Contracted Lab - Chain of Custody Assurance (Attachment 2) and Testing Procedures - Oral Fluid (Attachment 4).

#### **E. Breath Alcohol Screening**

1. An offender's refusal to submit to a breath alcohol screening test will be treated as a positive test result.
2. Employees/contract staff will use only Department authorized breathalyzer instruments.



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
8 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

3. Offenders who are not directly involved in the test will not be permitted in the testing area.
4. Testing procedures are identified in Attachment 3. Testing procedures and accuracy check will be consistent with manufacturer's recommendations.
5. The Drug Testing Coordinator/CCS or designee will maintain the testing equipment records.
  - a. An accuracy check will be conducted monthly per manufacturer's instructions.
  - b. A calibration will be conducted by certified, trained personnel at least every 6 months and as needed when the instrument does not register accurately.
    - 1) The personnel will be responsible for the accuracy readings of the instruments they calibrate and may be called to a court or Department hearing to declare they have had the required training.
  - c. The Prisons and Community Corrections Division will maintain a current list of certified personnel authorized to conduct instrument calibration.
  - d. All accuracy checks and calibrations will be documented on DOC 14-311 Accuracy/Calibration Check Record. This record will be kept with the instrument and accessible for auditing purposes.
6. Offenders who provide a positive test reading of .020 or higher will be referred appropriately per the Response to Positive Test section of this policy.

### **VIII. Test Results**

- A. If the test result is negative, the tester will inform the offender of the result and document the result in the offender's electronic file. [5A-09]
- B. If the test result is positive for the instant on-site drug test, the tester will have a witness confirm the test result. The tester will document the result and the name of the witness in the offender's electronic file. [5A-09] The tester will provide the offender an opportunity to admit use.



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
9 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

1. If the offender admits use, s/he will be presented with DOC 14-021 Drug Use Admission for signature. If the offender signs the form, the tester will document the admission in the offender's electronic file, and no further testing will be required.
  2. If the offender denies use, s/he may be allowed to provide a new specimen for testing.
- C. In Prisons, the results must be documented prior to a transfer or release.
- D. All specimens sent to the contracted lab will be confirmed through Gas Chromatography Mass Spectrometry (GC/MS) and Liquid Chromatography Mass Spectrometry (LCMS).
1. The contracted lab will test for the following adulterants: nitrites, creatinine, pH, and specific gravity.
    - a. When the nitrite is positive or the pH is out of range, the specimen is consistent with an adulterated specimen, and the offender will be subject to an infraction/violation.
    - b. When the creatinine and specific gravity levels are both out of range, the specimen is consistent with a diluted specimen, and the offender may be charged with a violation.
  2. Specimen samples tested as positive will be frozen and retained by the lab for at least 6 months after the results have been reported to the Department. At the request of the Department, individual samples will be kept until final disposition of any court/Department action.
- E. A copy of a confirmed positive test result will be forwarded to the central/offender file and to the assigned chemical dependency professional, if applicable.
- IX. [5A-09] Specimen Storage and Transfer
- A. For specimens being sent to the contracted lab, Department responsibility for the chain of custody is only complete when the test result has been documented in the offender's electronic file and the specimen has been processed per:
1. Testing Procedures - Urine (Attachment 5) or Testing Procedures - Oral Fluid (Attachment 4), as applicable, and
  2. Processing Specimens for Contracted Lab - Chain of Custody Assurance (Attachment 2).



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
10 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

- B. Specimens not transported within 24 hours of collection must be stored in a secured receptacle.
  - C. Handling and transportation of specimens should be documented on DOC 14-038 Drug Test Log Chain of Custody Assurance. The number of persons handling the specimens must be kept to a minimum.
  - D. Log sheets, any receipts from couriers, and other drug/alcohol testing records must be secured and retained per the Records Retention Schedule.
- X. Response to Positive Test
- A. In Prisons, upon receipt of a positive screening, the Drug Testing Coordinator will ask Health Services to complete DOC 14-036 Medication Certification to determine any possible cross-reactions between any prescribed medications the offender may be taking. In Work Releases and in the community, when confirmation is requested, employees/contract staff will submit verification of any prescribed medication with the test sample.
  - B. [5A-09] Positive tests will be addressed per DOC 320.150 Disciplinary Sanctions or DOC 460.135 Disciplinary Procedures for Work Release, as applicable.
  - C. An offender on community supervision who tests positive for a prohibited substance may be arrested and placed in total confinement. The violation will be addressed per DOC 460.130 Violations and Hearings.
    - 1. An offender approved to use Marinol®/dronabinol or medical marijuana per DOC 620.380 Offender Medical Marijuana Use will not be in violation if s/he tests positive for THC.
    - 2. An offender who is seeking approval to use medical marijuana as outlined in DOC 620.380 Offender Medical Marijuana Use should not receive any violation related to medical marijuana during the review process.
  - D. [5A-09] Positive drug/alcohol tests for offenders in DOSA Community Residential Treatment Program will be reported to the court with a recommended sanction per DOC 460.135 Disciplinary Procedures for Work Release or DOC 460.130 Violations and Hearings.

### **DEFINITIONS:**

Words/terms appearing in this policy may be defined in the glossary section of the Policy Manual.



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**PRISON/WORK RELEASE/FIELD**  
OFFENDER/SPANISH MANUALS

REVISION DATE  
9/24/12

PAGE NUMBER  
11 of 11

NUMBER  
**DOC 420.380**

## **POLICY**

TITLE  
**DRUG/ALCOHOL TESTING**

### **ATTACHMENTS:**

Drug Testing Methods and Occasions of Use (Attachment 1)  
Processing Specimens for Contracted Lab - Chain of Custody Assurance (Attachment 2)  
Testing Procedures - Breath Alcohol Screening (Attachment 3)  
Testing Procedures - Oral Fluid (Attachment 4)  
Testing Procedures - Urine (Attachment 5)

### **DOC FORMS:**

DOC 14-002 Consent for Drug/Alcohol Testing - Total and Partial Confinement  
DOC 14-021 Drug Use Admission  
DOC 14-035 Consent for Drug/Alcohol Testing - Field  
DOC 14-036 Medication Certification  
DOC 14-037 Instant On-Site Drug Testing and Breathalyzer Data Collection Sheet  
DOC 14-038 Drug Test Log Chain of Custody Assurance  
DOC 14-311 Accuracy/Calibration Check Record



## DRUG TESTING METHODS AND OCCASIONS OF USE

Systems	When to Use	Confirmation
<b>Urinalysis - On-Site</b> <i>Through Regional Business Office</i>	<ul style="list-style-type: none"> <li>As outlined in policy</li> </ul>	<ul style="list-style-type: none"> <li>Send urine specimen to contracted lab for GC/MS confirmation when determined appropriate or necessary and approved by CCS</li> </ul>
<b>Urinalysis - Off-Site</b> <i>Through contracted lab for screen or confirmation</i>	<ul style="list-style-type: none"> <li>For random testing of 2% of Prison population</li> <li>When determined appropriate or necessary for additional substances or confirmation, as outlined in policy</li> </ul>	<ul style="list-style-type: none"> <li>Send urine specimen to contracted lab for GC/MS screening/confirmation</li> </ul>
<b>Oral Fluids</b> <i>Through Regional Business Office</i>	<ul style="list-style-type: none"> <li>When there is no same sex officer available</li> <li>Documented major medical issues that may preclude urination</li> <li>Imminent threat to public safety</li> <li>Marijuana is <u>not</u> suspected</li> <li>Record of suspicious flushing or adulteration of urine</li> <li>At the collector's discretion when the offender is unable to provide a urine sample within the allotted time</li> </ul>	<ul style="list-style-type: none"> <li>Send oral fluid kit on positive tests to contracted lab for GC/MS confirmation to lab when determined appropriate or necessary</li> </ul>

**PROCESSING SPECIMENS FOR CONTRACTED LAB  
CHAIN OF CUSTODY ASSURANCE**

1. If the specimen is being preserved as evidence, ensure the identification numbers on the adhesive label matches the offender name and DOC number.
2. In the presence of the offender, ensure that the container lid is secure.
  - a. For urine tests, apply the adhesive label to the specimen cup.
  - b. For oral fluid tests, ensure the cap is secure over the absorbent pad.
3. Have the offender initial the tamper evident tape and place the tape over the container lid in the offender's presence.
4. To send specimens to the lab:
  - a. Ensure the specimen is placed in the sealable plastic bag along with the moisture-absorbent packet.
  - b. Place the original requisition form in the outer pouch and seal the bag.
  - c. Ensure the bag remains in his/her direct visual supervision until secured in the designated location.
  - d. Place all bagged specimens in the mailer provided and send to contracted lab through the U.S. Postal Service.
5. Complete DOC 14-038 Drug Test Log Chain of Custody Assurance with the names and numbers of all offender specimens that will be sent to the contracted laboratory.
6. Retain DOC 14-038 Drug Test Log Chain of Custody Assurance.
  - a. In Prison, attach all receipts left by couriers to the respective DOC 14-038 Drug Test Log Chain of Custody Assurance.

## **TESTING PROCEDURES BREATH ALCOHOL SCREENING**

### **ALCO-SENSOR III**

1. No alcohol for 15 minutes before testing. No smoking within 3 minutes of testing.
2. Check temperature display – should be 20-36 degrees Celsius.
3. Press the SET button.
4. Press and hold the READ button.
5. Confirm display goes down to 0.000 in approximately 10-15 seconds. If it does not, repeat steps 4 and 5.
6. Attach plastic mouthpiece to top of instrument. The offender will blow into the long end.
7. Press the SET button.
8. Have offender blow 10-15 seconds. This needs to be a deep lung breath. Be sure to point the instrument away from you.
9. Press the READ button for the last 4-5 seconds while the offender is blowing.
10. Keep the READ button pressed until a “peak” reading is obtained. This can take up to 45 seconds.
11. Remove and discard mouthpiece.
12. Store instrument with the SET button depressed.

### **ALCO-SENSOR IV**

1. Insert mouthpiece. This will turn the unit on.
2. Once mouthpiece has been properly inserted, the unit's temperature should read between 10-40 degrees Celsius. If the unit's temperature is not within this range, remove mouthpiece and take steps to bring temperature to within the operating range.
3. Unit will prompt to press the SET button. Follow any prompts that the unit may give (e.g., “WAIT”).
4. When unit displays BLNK, it is running a blank test. Either a zero (0) or “VOID” will be displayed. If VOID is displayed, the instrument is not clear of alcohol. Start over by depressing the SET button again.
5. Once zero (0) is displayed, if the instrument is ready to test it will display “TEST”.
6. Instruct the offender to take a deep breath, hold it, and then blow steadily through the mouthpiece for as long as s/he can. A (+) will appear indicating that the instrument is

## **TESTING PROCEDURES BREATH ALCOHOL SCREENING**

sensing the breath flow. If a (+) does not appear, stop the offender and instruct him/her to blow with more force.

7. When the offender has blown a minimum volume of breath, a (++) appears. The sample will be taken ONLY if the condition has been met and when the breath flow diminishes.
8. As soon as a successful breath sample has been taken, the busy signal (</>) is displayed to indicate that the instrument is analyzing the breath sample. A sample with no alcohol will result in a zero (0) reading almost instantly. A breath sample containing alcohol will register a 3-digit display in about 10-40 seconds. The final reading will be accompanied by a 3-tone beep.
9. Press the SET button and the RELEASE button to eject the mouthpiece.
10. The Alco-Sensor IV should remain idle for at least one minute following a positive test reading.

### **ALCO-SENSOR FST**

1. Nothing in mouth for 15 minutes before testing.
2. Attach a new mouthpiece.
3. The standard operating temperature should be between 0-50 degrees Celsius. If the temperature is outside this range, the instrument will indicate this condition and power itself off. If this occurs, take steps to bring temperature to within the operating range.
4. When the display shows the icon of a person's head flashing and/or BLO is displayed, instruct the offender to take a deep breath, hold it, and then blow steadily through the mouthpiece for as long as s/he can.
5. The icon of the head will stop flashing and a dash will appear to the right of the head. This indicates that the instrument senses sufficient breath flow.
6. Once 3 dashes appear, an automatic sample will be taken.
7. As soon as a successful breath sample has been captured, a series of dashes will scroll across the display. At the end of the analysis, a result will be displayed.
8. The result will be displayed for 15 seconds before the instrument will power itself off.
9. To initiate a subsequent test, press the "on" button to restart the instrument.

## **TESTING PROCEDURES ORAL FLUID**

1. Prior to opening the foil pouch, check the expiration date. Do not use beyond the expiration date.
2. Open the packet containing the test kit in full view of the offender. A moisture absorbent packet is enclosed with the test kit, which may be a safety issue in Prisons. Handle according to established protocols.
3. Make sure the offender does not put anything into his/her mouth for at least 10 minutes prior to collecting the saliva sample.
4. Remove the device and collection swab from the foil pouch. Do not use if the pouch is not intact. Verify that the test slide "C" has not been pushed down into the device. Ensure that the feet on the tabs are resting on the top of the device.
5. Keeping the device on a flat surface, remove the blue instruction label covering the wells labeled "A" and "B". Insert the handle of the collection swab into each of the "A" wells, pushing down completely until the ring on the swab is level with the top of the well.
6. Keeping the device on a flat surface, gently agitate the buffer within the device by moving it from side to side for about 3 seconds.
7. Instruct the offender to open the silver and clear plastic pouch that contains the collection swab. Then instruct the offender to place the sponge between the cheek and gum and swab for at least one minute on each side of the mouth, without chewing or sucking on the sponge.
8. Observe the offender during the collection process. If after 2 minutes the sponge is not fully expanded to completely cover the exposed rod, continue the sample collection process until the sponge is fully expanded.
9. Have the offender remove the collector from his/her mouth and hand it to you. Do not allow the offender to suck on the sponge on removal.
10. Gently drop the swab into well "B" allowing it to settle vertically. Leave the collection swab in place for at least 5 seconds. After waiting 5 seconds, the collection swab can be removed and the plastic cover replaced over the sponge.
11. Keeping the device on a flat surface, agitate gently from side to side for at least 3 seconds.
12. Set a timer for 8 minutes. This is the incubation phase, which should be a minimum of 8 minutes.
13. After the incubation period, push down the test slide "C" into the device by pressing in on the side tabs and pushing the test slide down until it stops. This starts the testing phase.

## **TESTING PROCEDURES ORAL FLUID**

14. The test results may be interpreted 3-8 minutes after the test slide was pushed down into the device.
15. If at 3 minutes all lines have formed (i.e., both test valid lines and all drug lines), the test results may be interpreted as Negative.
16. If one or more of the drug lines has not formed, wait a full 8 minutes to interpret the results.
17. Band intensity is not important when interpreting test results. Incomplete or faint bands are considered bands.
18. Make sure the test is valid by checking the TEST VALID window.
  - a. If both bands are visible, the test is VALID.
  - b. If one or both bands are NOT visible, the test is NOT VALID.
    - Repeat test with a new kit.
19. Read results:

### **Negative results**

- a. The presence of the reddish-purple Test Valid line AND a reddish-purple line adjacent to the particular drug.
- b. Any line, regardless of intensity, color, or size, is a line that indicates a negative result for that drug.
- c. If the reading(s) is negative, the process is complete. Discard the testing instrument in a normal waste depository. No further precautionary measures are necessary.

### **Positive results**

- a. The presence of the reddish-purple Test Valid line and NO line adjacent to the particular drug.
20. If lab confirmation is being requested, complete the contracted lab's form, attach the ID sticker from the form to the specimen, and follow Processing Specimens for Contracted Lab - Chain of Custody Assurance (Attachment 3).
21. If lab confirmation is not being requested, discard the testing instrument in a normal waste depository. No further precautionary measures are necessary.

## **TESTING PROCEDURES URINE**

1. Ensure the appropriate consent form has been completed.
2. Check the offender's identification to verify identity, name, and DOC number.
3. Inform the offender, prior to the specimen collection, that refusal/failure to provide a specimen within one hour will result in an infraction/violation.
4. Facilitate the urine collection in a secure, private, and sanitary area. There will be no unsupervised access to water fountains, faucets, soap, cleaning agents, or other materials which can dilute or alter the specimen.
5. Always wear protective gloves during the observed collection process.
6. The offender will be allowed up to one hour to provide a urine specimen. The offender may be allowed up to 2 hours to provide a sample only if there is a prior established medical issue on file. During this process, the offender may not ingest more than 8 ounces of water. Place the container in a secured area until the offender is able to provide the specimen.
7. Ensure the offender thoroughly washes his/her hands without soap and dries them with materials provided, or the offender may wear protective gloves provided.
8. The offender will remove any jacket or coat, lift his/her shirt to expose his/her midriff, and roll up long sleeves. If a strip search is being conducted in conjunction with the urine collection, the offender will be allowed to dress prior to proceeding with the urine collection.
9. Prior to providing the sample, male offenders will allow their pants/jeans and underwear to fall to their ankles for visual observation of the container and the offender's hands/genital area.
10. Female offenders will provide a urine sample into a "hat" provided.
11. Inspect the offender's hands and fingernails for possible contaminants prior to providing the specimen.
12. Prior to opening the foil pouch, check the expiration date. Do not use beyond the expiration date.
13. Ensure that the specimen cup being used is at room temperature (i.e., 59-86 degrees Fahrenheit).
14. Open the pouch and put an identifying name/number on the label.
15. Hand the cup and lid to the offender and allow him/her to visually inspect it.
16. Instruct the offender to fill the cup approximately 1/3 full.

## **TESTING PROCEDURES URINE**

17. When the offender has finished providing the specimen, have him/her place the lid on the cup and tighten. If the offender is unable to produce a urine specimen within the allotted time, an oral fluid specimen may be collected at the collector's discretion.
18. Set the specimen cup on a flat surface. The test will start once the offender has finished providing the specimen.
19. Read the temperature strip within 4 minutes of the offender providing the specimen to verify that the temperature of the specimen is within acceptable range (i.e., 90 - 100 Fahrenheit). If no temperature is visible, the test may be repeated with a new sample.
20. Allow the test to run until the control line (i.e., reddish purple line next the "C") appears, which generally takes 3 to 5 minutes. Once the control line appears, the results may be interpreted. If no control line appears after 10 minutes, the cup is considered invalid, and the test should be repeated with a new sample.
21. Results are based on the presence or absence of a line next to each specific drug. Line intensity may vary between drugs. Any line, regardless of intensity, will be interpreted as a negative test.
22. A positive test is no line, totally devoid of color, next to a specific drug.
23. If lab confirmation is being requested, complete the contracted lab's form, attach the ID sticker from the form to the specimen, and follow Processing Specimens for Contracted Lab - Chain of Custody Assurance (Attachment 2).
24. If lab confirmation is not being requested, dispose of urine specimens according to established protocols. Note: Urine is not a bio-hazard.



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STATE OF WASHINGTON  
NO. 44691-0-II

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COURT OF APPEALS OF WASHINGTON

DIVISION II

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IN THE MATTER OF THE APPLICATION  
FOR RELEASE FROM PERSONAL RESTRAINT

OF:

MARK LEE MILLER,

PETITIONER

---

FIRST AMENDED

PERSONAL RESTRAINT PETITION

---

Mark Lee Miller

265210 : TRU : D-618

PO Box 888

Monroe WA 98272

Petitioner, Pro se

## TABLE OF CONTENTS

TABLE OF STATE AUTHORITIES .....	ii - iii
TABLE OF FEDERAL AUTHORITIES .....	iv
A. - Status of Petitioner .....	1
B. - Grounds for Relief .....	1 - 3
FACTS RELEVANT TO PETITION.....	4 - 9
I - First Ground .....	10 - 14
II - Second Ground .....	15 - 19
III - Third Ground .....	20 - 22
IV - Fourth Ground .....	23 - 24
V - Fifth Ground .....	25 - 28
VI - Sixth Ground .....	29 - 31
VII - Seventh Ground .....	32 - 33
VIII - Conclusions .....	34 - 35
IX - Relief Requested .....	35 - 36
***Statement of Finances is omitted from the amended form of this petition	
Oath of Petitioner [copy].....	37

### Appendices

- A- Exhibits one through ten
- B- RCW 9.95.120 through 9.95.125
- C- WAC 381-70 [in relevant part]
- D- Laws of 1997, 11h 350
- E- THird Engrossed Substitute Senate Bill 6151  
    [Laws of 2001, 2d Sp. Sess., 11h 12]

# TABLE OF STATE AUTHORITIES

<b>Adams, Restraint of</b>	132 Wn 2d 640 (2006 Div 1).....	16, 17
<b>Burton, Restraint of,</b>	80 Wn App 573 (1996).....	17, 18, 32, 34
<b>Dawson v. Hearing Comm.</b>	92 Wn 2d 391, 597 P2d 1353 (1979).....	17
<b>Downey v. Pierce County,</b>	165 Wn App 152 (2011, Div II).....	15, 16, 18, 34
<b>Hearst Communications, Inc., v. Seattle Times Co.,</b>	154 Wn 2d 493, 115 P3d 262 (2005).....	26
<b>Ladson, State v.,</b>	138 Wn 2d 343, 979 P2d 833 (1999).....	28
<b>Monohan v. Burdman,</b>	84 Wn 2d 922, 814 P2d 635 (1991).....	17
<b>National Bank of Washington v. Equity Inv., Inc.,</b>	81 Wn 2d 886, 506 P2d 20 (1973).....	23
<b>Oliver v. Flow Intern. Corp.,</b>	137 Wn App 655, 155 P3d 140 (2006).....	26
<b>Patrice v. Murphy,</b>	136 Wn 2d 845, 966 P2d 1271 (1998).....	10
<b>Reismiller, Restraint of,</b>	101 Wn 2d 324 (1984).....	30
<b>Thomas, State v.,</b>	103 Wn App 800, 14 P3d 854 (2000, DIv II).....	10, 11, 13, 14, 35
<b>Washington Fed'l Savings &amp; Loan v. Alsager,</b>	165 Wn App 14, 266 P3d 905 (2011, DIv I).....	27, 28
<b>Washington Federation of State Employees v. State,</b>	127 Wn App 544, 901 P2d 1028 (1995).....	13
<b>Wright v. Dave Johnson Insurance, Inc.,</b>	167 Wn App 758, 275 P3d 335 (2012, Div 2) .....	26, 27, 28

## STATUTES

<b>RCW 9.95.0001</b> .....	20, 28
<b>RCW 9.95.0011 [1997]</b> .....	10, 12, 35

TABLE OF STATE AUTHORITIES (cont.)

STATUTES (cont)

RCW	9.95.002.....	11
	9.95.005.....	10
	9.95.080.....	16, 19
	9.95.120 - .125.....	15, 18, 19, 21, 30, 32
	9.95.900.....	10

ADMINISTRATIVE REGULATIONS

WAC	381-70.....	15, 18
	381-70-040.....	18, 19, 32
	381-70-160.....	21, 30, 32
	381-70-400.....	27, 32, 34

CONSTITUTIONAL PROVISIONS

**ARTICLE I:**

SEC	3.....	11, 23
Sec	7.....	7, 27

**Article II:**

SEC	19 .....	8, 10
-----	----------	-------

OTHER AUTHORITIES

HB	1646.....	8
3ESSB	6151.....	8, 9, 10, 12, 13, 14
DOC	420.380 .....	31, 33, 35

## TABLE OF FEDERAL AUTHORITIES

<u>Armstrong v. Monzo</u> , 380 U.S. 545 (1965).....	15
<u>Baldwin v. Hale</u> , 1 Wall 223 (1863).....	15
<u>Daubert v. Merrill Dow Pharmaceuticals</u> 113 S. Ct. 2786, 509 U.S. 598 (1993).....	30
<u>Fuentes v. Shevin</u> , 92 S. Ct. 1983, 407 U.S. 67 (1972).....	15, 18, 34
<u>Gagnon v. Scarpelli</u> , 411 U.S. 773 (1973).....	32, 34
<u>GREENHOLTZ V. NEBRASKA PENAL AND CORRECTIONAL COMPLEX</u> , 442 U.S. 319 (1976).....	14
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976) .....	15
<u>MORRISSEY v. BREWER</u> , 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed 2d 484 (1972)..	19
<u>Wolff v. McDonnell</u> , 418 U.S. 773 (1973).....	17, 32
<u>Young v. Harper</u> , 520 U.S. 143 (1997).....	21

## United States Constitution

Amendment IV.....	27
Amendment XIV .....	15, 16,

**A. - STATUS OF PETITIONER**

1. Mark Lee Miller, Petitioner, Pro se, 2321 Dayton Airport Rd., PO Box 900, Shelton, WA, 98584, applies for release from confinement.
2. Petitioner is now in custody pursuant to an order of the Indeterminate Sentence Review Board (ISRB) revoking the parole granted on 3 February 2010 - for Clark County 79-1-00126-1.
3. Petitioner was sentenced after plea of guilty to 40-years on Robbery 1st degree on 11-11-79.
4. The judge who imposed sentence was the honorable J. Dean Morgan [former A.C.J. of Div. II].
5. Petitioner's Lawyer at trial was Darrell E. Lee.
6. Petitioner did not appeal from the decision of the trial court.
7. In 2009, Petitioner asked the Washington Supreme Court for relief based upon actions committed by the ISRB in 2008. The Petition was dismissed after the ISRB agreed to provide Petitioner with a new hearing.
8. Petitioner prosecuted the Personal Restraint Petition Pro se.
9. For a complete statement of facts relevant to petition, see Part B, infra.

**B. — GROUNDS FOR RELIEF**

Petitioner claims seven (7) grounds upon which this court should grant relief:

**B.1 First Ground**

DOES THE REPEAL OF THE TERMINATION PROVISION  
OF THE ISRB [RCW 9.95.0011] CONTAINED IN 3ESSB  
6151 [Laws of 2001, 2d Sp. Sess, c 12] VIOLATE  
ART II, SEC 19, WASHINGTON CONSTITUTION?

**B.2 Second Ground**

IS THE ISRB REQUIRED TO PROVIDE A PAROLEE  
MINIMAL DUE PROCESS BEFORE REVOKING A CDFS  
AT THE REQUEST OF THE DEPARTMENT?

**B.3 Third Ground**

DOES THE DEPARTMENT HAVE LEGAL AUTHORITY TO  
REQUEST THE ISRB TO REVOKE THE CDFS OF AN  
OFFENDER NOT UNDER THE JURISDICTION OF THE  
DEPARTMENT?

**B.4 Fourth Ground**

DOES THE ISRB'S FAILURE TO HEAR CHARGED  
VIOLATIONS WITHIN THIRTY DAYS CONSTITUTE A  
DENIAL OF DUE PROCESS?

**B.5 Fifth Ground**

DID THE DEPARTMENT HAVE LEGAL AUTHORITY  
TO REQUIRE PETITIONER TO PROVIDE A URINE  
SPECIMEN DIRECTLY TO THE DEPARTMENT ON 27  
DECEMBER 2012?

**B.6    Sixth Ground**

DOES AN UNCORROBORATED RESULT FROM AN  
ON-SITE DRUG SCREEN VIOLATE THE HEARSAY  
PROHIBITION OF **WAC 381-70-4004**?

**B.7    Seventh Ground**

DOES THE UNCORROBORATED RESULT FROM AN  
ON-SITE DRUG SCREEN CONSTITUTE "SOME EVIDENCE" ?



### Facts Relevant to Petition

1. On 31 December 2009, the Indeterminate Sentence Review Board (ISRB) paroled Petitioner to a COnditional Discharge From Supervision (CDFS) effective 3 February 2010. [See Appendix -A-, Ex #1].
2. Over the next eighteen months Petitioner had several encounters with officers of the Goldendale Police Department (GPD); to date all charges have resolved favorably to Petitioner.
3. On 9 December 2011, Petitioner was arrested on the charge of "Unlawful Harboring of a Minor", because Petitioner refused to allow Wyzkowski to enter the residence to search for his daughter without a warrant.
4. Under the facts alleged Petitioner was at least immune from prosecution -- and at most the offense was legally impossible for Petitioner to commit.
5. The charge of "Unlawful Harboring of a Minor" was later dismissed on Petitioner's Pro se motion.
6. Prior to the dismissal of the charge, Officer Wyzkowski contacted Community Corrections Officer (CCO) RONda Nielsen, of the Department of Corrections (Department) and requested the Department's assistance against Petitioner.
7. On 20 December 2011, Nielsen submitted what is recorded as "Board Special", requesting the ISRB revoke Petitioner's CDFS and return Petitioner to active supervision under the jurisdiction of the Department, and Nielsen.

8. On 29 December 2012, the ISRB revoked Petitioner's CDFS and imposed conditions of supervision. Condition number three (3) provides as follows:
  9. "You will submit to periodic and random drug and/or alcohol monitoring through an agency approved by your CCO and sign a full release of information permitting the monitoring agency to release information to your CCO and the Indeterminate Sentencing Review Board (ISRB).
10. At no time during this process did Nielsen, the Department, GPD, or the ISRB notify Petitioner of any allegations of misconduct, or apprise Petitioner of the requested sanctions.
11. At no time prior to the ISRB actually revoking Petitioner's parole was petitioner permitted to present evidence or testimony on his own behalf.
12. The ISRB has never provided petitioner a statement of the allegations charged against him in support of the Department's request to revoke Petitioner's CDFS. Neither has the ISRB provided Petitioner a written statement of the evidence relied upon and the reason for the decision revoking his CDFS.
13. On 26 October 2012, Petitioner was arrested on a warrant of the ISRB and charged with the following three (3) violations:
  14. #1) Failing to report to DOC as directed since 8/29/2012 in Goldendale, WA.
  15. #2) Failing to report a change of residence on or about 09/12/2012; and,

16. #3) Failing to obtain a drug/alcohol evaluation as directed on 07/26/2012 [see Appendix -A-, Ex #3 and Ex #7, pg 1].
17. Petitioner was served with the foregoing violations on 30 October 2012 [See Appendix -A-, Ex #3].
18. On 7 December 2012, the ISRB ordered Petitioner's conditional release from the Klickitat County Jail pending an on-site revocation hearing of 8 January 2013. [See Appendix -A-, Ex #6]. On the date of Petitioner's release from jail thirty-eight days had elapsed since service of the charged allegations. A total of seventy (70) days would elapse before the hearing scheduled.
19. On 27 December 2012, Petitioner reported to the Department field office in Goldendale, WA., as instructed. CCO3 Nielsen then ordered Petitioner to provide a urine specimen to the Department for on-site testing.
20. Petitioner complied with the order despite its being in direct contravention of the order of the ISRB. Petitioner further reminded Nielsen he was taking prescribed medications. Nielsen next informed Petitioner the test indicated a positive result for both opiates and methamphetamine.
21. Petitioner requested to see the test results. After personally viewing the result strip, Petitioner indicated that a visible line was apparent in each of the requisite slots--thus, the result was negative.

22. Both Department employees argue for a result contrary for that apparently indicated, so petitioner asked the have confirmatory retesting done to the specimen using gc/ms.
23. Nielsen stated it did not meet Departmental policy criteria for retesting. Nielsen further indicated that because she had an abiding belief in the result of the test, policy allowed her to deny confirmatory retesting. [Appendix -A-, Ex #9, DOC 420.380, Attachment 1].
24. Nielsen further failed to inform Petitioner that policy did permit him to provide a second specimen on-site for immediate testing if he was not in accord with the accuracy or results of the first test. [DOC 420. 380. VIII(2)].
25. Nielsen then ordered Petitioner's arrest, and the destruction of both the initial specimen, as well as the resultant test strip.
26. On 8 January 2013, Petitioner appeared before ISRB member Thomas Sahlberg on all five charged violations.
27. Defense counsel Christopher Lanz motioned to have counts #4 and #5 (relating to the alleged U/A results) dismissed under **WAC 381-70-400** - as the allegations were based entirely on hearsay that would not be admissible in a Superior Court proceeding.
28. Sahlberg denied the motion, but declared any finding would not be based upon hearsay. [See Appendix -A-, Ex #7, Rulings].
29. At the conclusion of the hearing Sahlberg found Petitioner in violation of all allegations except #2 (changing residence) and on

17 January 2013 revoked Petitioner's parole and ordered his return to prison.

**\*\* FACTS RELATING TO ARTICLE II, SECTION 19 \*\***

30. Article II, Section 19, of the Washington Constitution provides that:
31. "No bill shall embrace more than one subject, and that shall be expressed in its title."
32. In 1997, our legislature amended **RCW 9.95.0011** pursuant to HB 1646 [See Laws of 1997, c 350, § 1, attached as Appendix -D-].
33. In relevant part the amendment provides:
34. "The indeterminate sentence review board shall cease to exist on June 30, 2008".  
[Hereinafter "The Termination Provision"].
35. The ISRB exerts authority and jurisdiction over all persons convicted of offenses committed prior to July 1, 1984.
36. Petitioner is subject to the jurisdiction of the ISRB based upon his conviction for Robbery in the First Degree: a non-sex offense.
37. In 2001, our legislature enacted Third Engrossed Substitute Senate Bill 6151 [3ESSB 6151]: "An Act Relating to the Management of Sex Offenders in the Civil Commitment and Criminal Justice Systems".
38. Section 501(1) of the Act repealed the termination provision of the ISRB [See Appendix -E-, p 91, sec 501].

39. Other sections of the Act amended the entire Indeterminate Sentencing system, which affect all non-sex offenders still serving indeterminate sentences.
40. Petitioner is not a sex offender, and is a member of the class of offenders whose rights and liabilities are affected by the Act.
41. A Persoanl Restraint Petition is the proper vehicle for an inmate to challenge the constitutionality of a legislative act.
42. This Petition follows.

## FIRST GROUND

- 1.1 DOES THE REPEAL OF THE TERMINATION PROVISION OF THE ISRB [RCW 9.95.0011 (1997)] CONTAINED IN ESSB 6151 [2001, ch 12, 2d Special Sess.] VIOLATE ARTICLE II, SECTION 19, WASHINGTON CONST.?

### Argument

- 1.2 Article II, Section 19 of the Washington Constitution provides: "No bill shall embrace more than one subject, and that shall be expressed in its title." **State v. Thomas**, 103 Wn App 800, 806, 14 P3d 854 (2000, Div II).
- 1.3 Our Supreme Court has interpreted Art. II, Sec 19 as two separate prohibitions: (1) No bill shall embrace more than one subject; and (2) The subject of every bill shall be expressed in its title. **Thomas**, supra, citing **Patrice v. Murphy**, 136 Wn 2d 845, 852, 966 P2d 1271 (1998).
- 1.4 Legislative titles may be either general or restrictive. A general title is constitutionally sufficient if it gives such notice as should reasonably lead to an inquiry into the body of the act itself, or indicates to an inquiring mind the scope and purpose of the law. **Thomas**, supra.
- 1.5 A restrictive title, on the other hand, "is one where a particular part or branch of legislation is carved out and selected as the subject of the legislation. A restrictive title is "narrow" as opposed to "broad", and it is of specific rather than general import. **Thomas**, 103 Wn App at 808. A restrictive title will not be liberally regarded and provisions not within its subject are not given force. *Id.*

- 1.6 In the matter now presented, it is clear that "An Act Relating to the Management of Sex Offenders in the Civil Commitment and Criminal Justice Systems" [Appendix -E-] carves out the narrow subject of "The Management of Sex Offenders." The question then to be decided is whether any part of this act can constitutionally affect the rights and liabilities of non-sex offenders under the state's indeterminate sentencing laws?
- 1.7 In search of the answer to this question, Petitioner asks this court to closely review its reasoning described in **Thomas** (103 Wn App at 812). There, this court reasoned that "if the Legislature attempted to include the entire Criminal Profiteering Act in this bill, that would have plainly violated the constitutional mandate."
- 1.8 Likewise, if the legislature attempted to include the entire indeterminate sentencing system in chapter 12, laws of 2001, 2d special session, this would clearly violate the constitutional mandate -- would it not? Nonetheless, in effect, this is exactly what the legislature did. [See Appendix -E-, ch 12, Laws of 2001, 2d Sp sess].
- 1.9 Washington laws, title 9, chapter 95, are entitled "Indeterminate Sentences", and impact all persons convicted of offenses committed before July 1, 1984. The Indeterminate Sentence Review Board (ISRB) [formerly the Board of Prison Terms and Paroles] oversees the sentences of all offenders under the indeterminate sentencing system -- regardless of the category of offense.



- 1.10 Pursuant to RCW 9.95.0011 [Laws of 1997, ch 350, sec 1] The ISRB would "cease to exist on June 30, 2008 ". In accord with this provision, indeterminate sentences and sentencing provisions would pass into history on that date for all offenders convicted of committing offenses before July 1, 1984. [See Appendix -D-].
- 1.11 Petitioner directs this court's attention to sections 307 through 353 (inclusive); amending RCW 9.95.005 through 9.95.900, and adding new sections to RCW 9.95. As well as section 501(1) [teh Repealer]. (See Appendix -E-, pp 1, 38-42, 55-73]. These provisions affect the rights and liabilities of all persons convicted of offenses committed before July 1, 1984.
- 1.12 The foregoing amendments are not restricted to sex offenders, but affect and impact the rights and liabilities of all persons serving sentences for crimes committed before July 1, 1984 [See Appendix -E-].
- 1.13 The Act is entitled "An Act Relating to the Management of Sex Offenders in the Civil Commitment and Criminal Justice Systems." That title carves out a very narrow "niche" or subject: i.e. the management of sex offenders.
- 1.14 Two questions must therefore be answered by this court:
- 1.15 (1) DOES THE REPEAL OF THE TERMINATION PROVISION OF THE ISRB AND THE AMENDMENTS TO PROVISIONS OF ALL INDETERMINATE SENTENCING STATUTES FALL WITHIN THE PENUMBRA OF THE NARROW TITLE OF THE ACT?; and,

- 1.16 (2) IF THE FIRST QUESTION IS ANSWERED IN THE NEGATIVE, THIS COURT MUST DECIDE IF THE ACT AUTHORIZES THE INDEPENDENT CREATION OF A "COMMUNITY CUSTODY BOARD" TO OVER-SEE THE REMAINING CONSTITUTIONAL PROVISIONS?
- 1.17 Petitioner believes the termination provision is clearly outside the narrow scope of subject matter carved out by the title, and therefore should be deemed a nullity. [See **Thomas**, 103 Wn App at 807, "A restrictive title will not be generally regarded and provisions not within its subject will not be given force or effect"].
- 1.18 However, Petitioner does not argue that due to this clear and apparent constitutional deficiency the entire act must fail. [See **Thomas**, 103 Wn App at 807, citing **Wash. Fed'n of State Employees v. State**, 127 Wn 2d 544, 555, 901 P2d 1028 (1995) A court will liberally construe Article II, Section 19, so as to sustain the validity of the legislative enactment].
- 1.19 First, section 504 of the act provides:
- 1.20 "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the Act or the application to other persons or circumstances is not affected." [See Appendix -E-, p 91, sec 504].
- 1.21 The intent of the legislature was to create a "Community Custody Board" separate and distinct from a "Parole Board". [See RCW 9.95.0001 - Definitions - (2) "Community Custody" and (5) "Parole"]. See also RCW 9.95.002, providing that this "Community Custody Board", in fulfilling its duties under the provisions of chapter 12, Laws of 2001, 2d Sp Sess., shall be considered a parole board as that concept was treated in law under the state's indeterminate sentencing

statutes.

- 1.22 Petitioner will argue that, as in **Thomas**, the Act can survive due to its severability clause. The ISRB can cease to exist as a "parole board" having jurisdiction over pre-1984 offenders, and yet remain as a constitutional "Community Custody Board" having jurisdiction over today's sexually violent predators, as the legislature intended.

#### SUMMARY

- 1.23 The question before this court is whether an Act strictly related to the Management of Sex Offenders can modify, alter, amend, or repeal statutes and provisions affecting the rights and liabilities of all persons serving indeterminate sentences -- without regard to their offense of conviction.
- 1.24 Our courts have repeatedly held that a restrictive title will not be generally regarded and provisions not within its subject will not be given force or effect.
- 1.25 Declaring the relevant sections void does not prevent the remainder of the act from remaining constitutional due to its severability clause.

## SECOND GROUND

- 2.1 IS THE ISRB REQUIRED TO PROVIDE A PAROLEE MINIMAL DUE PROCESS BEFORE REVOKING A CDFS AT THE REQUEST OF THE DEPARTMENT?

### ARGUMENT

- 2.2 "For more than a century the central meaning of procedural due process has been clear: parties whose rights are to be affected are entitled to be heard; and that they may enjoy that right they must first be notified." **Fuentes v. Shevin**, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), citing **Baldwin v. Hale**, 1 Wall 223, 233, 17 L. Ed. 531 (1863).
- 2.3 "A meaningful opportunity to be heard means 'at a meaningful time and in a meaningful manner'". **Mathews v. Eldridge**, 424 U.S. 319, 333, (1976) (quoting **Armstrong v. Monzo**, 380 U.S. 545, 85 S. Ct. 1187 (1965)). The United States Supreme Court has consistently held that some form of hearing is required **before** an individual is deprived of a [protected] interest. **Downey v. Pierce County**, 165 Wn App 152, 165 at ¶20 (2011, Div II) citing **Mathews**, 424 U.S. at 333 (emphasis in Downey).
- 2.4 Determining what process is due in a given situation requires consideration of (1) the private interest involved; (2) the risk that the current procedures will erroneously deprive a party of that interest; and (3) the governmental interest involved. **Downey**, Supra, (Internal citations omitted).

- 2.5 Department of Corrections CCO Ronda Nielsen (through e-mail correspondence with ISRB hearing officer Richard P. LaRosa) submitted numerous allegations of misconduct to the ISRB, and on 20 December 2012 formally requested the ISRB to revoke Petitioner's CDFS. [See Appendix -A-, Ex #4, pg 1; and Ex #7, page 5].
- 2.6 At no time throughout this process did either the ISRB or Department notify Petitioner of allegations charged, or of requested sanctions. [This court may take judicial notice of the dismissal of the allegation underlying the Department's request on defendant's pro se motion]. In addition, Nielsen had full knowledge of the unfounded nature of the charge at the time she initiated the "Board Special" request.
- 2.7 Without regard to the baseless nature of the allegations charged against petitioner -- both the Department and ISRB denied Petitioner the two most fundamental and bedrock elements we find essential to the concept of legal process: (1) Notice of the allegations charged (as well as the requested sanctions); and (2) A meaningful opportunity to be heard **before** governmental action can deprive Petitioner of a protected interest in both life and liberty. (See **Downey**, supra; and also **Restraint of Adams**, 132 Wn App 640, at ¶ 39 (2006, Div I) holding inmates entitled to minimal due process before Department may cancel established release date).
- 2.8 The function of legal process, as that concept is embodied in the constitution and in the realm of legal fact-finding, is to minimize the risk of erroneous decisions. **Greenholtz v. Nebraska Penal and Correctional Complex**, 99 S. Ct. 2100, 442 U.S. 1, 13 (1979).

- 2.9 Petitioner does not argue that he is necessarily entitled to the full panoply of rights as set forth in **RCW 9.95.120 - .125** and **WAC 381-70** (See also **Gagnon v. Scarpelli**, 411 U.S. 778 (1973)). However, Petitioner does maintain that he must at least be entitled to the minimal due process accorded inmates accused of misconduct. (Accord **Wolff v. McDonnell**, 418 U.S. 539 (1974)).
- 2.10 Minimal due process means the [person] must:
- (1) Receive Notice of the alleged violations;
  - (2) Be provided an opportunity to present documentary evidence and call witnesses;
  - (3) Receive a written statement of the evidence relied upon and the reason for the disciplinary action.
- 2.11 [In **re Burton**, 80 Wn App 573, 582 (1996) citing **Dawson v. Hearing Comm.**, 92 Wn 2d 391, 397, 597 P2d 1353 (1979) citing **Wolff**, 418 U.S. at 563-66].
- 2.12 Petitioner would like to point out that our Supreme court has held that these protections apply for actions as minor and tenuous as changing a tentative parole release date [See **Adams**, 132 Wn App at 1145, citing **Monohan v. Burdman**, 84 Wn 2d 922, 923, 814 P2d 635 (1991)].
- 2.13 The question being presented is simple: can the ISRB revoke petitioner's CDFS based entirely upon bald assertions and conclusory allegations of Department officers without providing Notice of the Allegations to the Petitioner, as well as providing him an opportunity to present evidence and testimony to challenge the accuracy and veracity of the charges levied against him?

- 2.14 The rule is that **before** governmental action can deprive a citizen of a life, liberty, or property interest, "some form of hearing is required." (**Downey**, supra). "And that they may enjoy that right, they must first be notified." **Puentes**, 407 U.S. at 80.
- 2.15 In application to the facts now presented, the incontrovertible truth clearly establishes Petitioner was denied every fundamental element essential to the principal of due process, and the concept of ordered liberty.
- 2.16 Petitioner was denied Notice of the Allegations and requested disciplinary action.
- 2.17 Petitioner was denied the opportunity to present evidence and testimony to challenge the accuracy and veracity of the allegations charged against him; and,
- 2.18 Petitioner was denied a written statement of the evidence relied upon, and the reason for the decision.
- 2.19 These are the minimum procedural protections our constitutions provide to the most heinous offender, secreted in the darkest recesses of our institutions, when accused of violating the simplest of rules. [See **Burton**, supra]. Our Constitution does not afford less to a parolee -- and it expressly forbids the kind of **Star Chamber** proceedings undertaken here.
- 2.20 If the Court examines **RCW 9.95.080** [See Appendix -E-, sec 328] (authorizing the board to revoke "any order theretofore made...", based

upon an offender's misconduct, it will discover that - even here -  
"such revocation and redetermination shall not be had except upon  
a hearing before the [board]. At such hearing the convicted person  
shall be present and entitled to be heard and may present evidence  
and witnesses in his or her behalf." (My Emphasis).

- 2.21 Our Constitution, statutes, and regulations protect Petitioner from  
the specific actions undertaken here.



### THIRD GROUND

- 3.1 DOES THE DEPARTMENT HAVE LEGAL AUTHORITY TO REQUEST THE ISRB TO REVOKE THE CDFS OF AN OFFENDER NOT UNDER THE JURISDICTION OF THE DEPARTMENT?

#### ARGUMENT

- 3.2 On 31 December 2009, the ISRB entered an order of parole to CDFS effective 3 February 2010. Pursuant to that order and CDFS, the Department was divested of authority or jurisdiction over petitioner. (Accord RCW 9.95.0001 (5) "Parole" means that portion of a person's sentence for a crime committed before July 1, 1984, served on conditional release in the community **subject to board controls and revocation** under supervision of the Department. (Emphasis added); see also WAC 381-70-040, which provides that if a parolee is arrested the cco shall notify the ISRB and state whether an order of suspension, arrest and detention has been (1) issued with approval of supervisor; (2) issued without approval of supervisor; (3) requested and not approved; or (4) not requested [See Appendix -C-, pg 2].
- 3.3 In accord with the foregoing provisions, Petitioner was not being supervised by the Department -- thus, Petitioner is not subject to the authority or jurisdiction of the Department.
- 3.4 Nonetheless, if a parolee is arrested on other criminal allegations, WAC 381-70-040 authorizes the Department to issue an Order of Suspension, Arrest, and Detention. This action has the following two effects:
- 3.5 (1) It authorizes the Department to request modifications in the supervision conditions (including a CDFS); and,
- 3.6 (2) It invokes all of the rights and procedural protections found in RCW 9.95.120 - .126, and WAC 381 - 70.

- 3.7 The rights of petitioner are encapsulated in the foregoing statutes, regulations, and board orders. [See Appendix -A-, ex #1; Appendices -B- and -C-]. Absent a breach by Petitioner, the Department lacks authority to request the ISRB to modify Petitioner's CDFS, and unless the Department submits a request for modification of a parolee's supervision status in accord with the governing statutes and Board rules, the ISRB is divested of the legal authority to modify, alter, or amend those release conditions. See **Young v. Harper**, 117 S. Ct. 1148, 1152, 520 U.S. 143 (1997) "... The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." [citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)].
- 3.8 Petitioner does not argue that the ISRB cannot alter, amend, or modify release conditions. Nor does Petitioner argue that the Department can never request modification of a parolee's release conditions. Petitioner argues that Department's requests to the ISRB must be in accord with statutes and regulations that authorize the request and provide procedural protections to the rights of the parolee.
- 3.9 Petitioner further argues that before the ISRB may implement modifications or amendments to a parolee's release conditions that substantially impact his liberty, he must be provided minimal procedural protections.
- 3.10 There exists a natural and well regulated system by which the Department makes recommendations to the ISRB (see WAC 381-70-040, and RCW 9.95.120 - .125, Appendices -B- and -C-). [See also **RCW 9.95.080**]. These

statutes and regulations provide a small system of checks and balances, with an overall purpose to afford some procedural protections to the rights of those persons under the jurisdiction of the ISRB. More specifically, once the Department issues an order of suspension, a parolee has an incontrovertible right to a hearing.

- 3.11 The question is whether the Department may legally request the ISRB to revoke the CDFS of a person not under the authority or jurisdiction of the Department.
- 3.12 The rule is that where regulations exist, they must be followed; failure to abide by these protocols denies a person due process of law.

#### FOURTH GROUND

- 4.1 IS IT A DENIAL OF DUE PROCESS WHEN THE ISRB  
FAILS TO HEAR CHARGED VIOLATIONS WITHIN  
THIRTY DAYS?

#### ARGUMENT

- 4.2 "Due process" - as that constitutional term of art is employed in the legal fact-finding context means "the process due", in a given circumstance. With regard to the rights and privileges afforded to persons accused of violating conditions of parole, that process is defined at RCW 9.95.120 and WAC 381-70-160. [See Appendices -B- and -C- (respectively)].
- 4.3 In relevant part, RCW 9.95.120, provides:
- "Whenever a paroled prisoner as accused of a violation of his or her parole,... he or she shall be entitled to a fair and impartial hearing of such charges within thirty days from the time that he or she is served with charges of the violations of conditions of parole after his or her arrest and detention ...." [See Appendix -B-, pg 1]. (Emphasis added).
- 4.4 In accord with the foregoing provision, Petitioner's right to a hearing within thirtydays of service of the charged violations is without question. The language is mandatory, and identicle language is reiterated at WAC 381-70-160(1) - the Board's own rule respecting parolee's rights.

The record is clear and inconvtravertible [sic] - Petitioner was served with violations one through three on 30 October 2012. [See Appendix -A-, Ex #'s 3, 4, and 7]. The Board's own rules require these to be heard within thirty days. It is an essential element of the rule making process of administrative regulations that once an agency adopts a rule, it must then abide by that rule.

- 4.6 It is abundantly clear that these matters were not heard until 8 January 2013 - a total of seventy days from the date of service. Moreover, the recor is devoid of rhyme or reason for this inordinate delay.
- 4.7 At this juncture, the Board may now attempt to argue the thirty-day limitation of action as inapplicable based upon the Board's issuance of its conditional release from custody on 5 December 2012 (effective 7 December 2012).
- 4.8 The fallacy inherent in this argument is three-fold:
- 4.9 (1) THirty-eight days has already elapsed at the time of Petitioner's release;
- 4.10 (2) Nothing in statute or rule requires the parole to be in custody. The right inheres in "when" the notice is served -- not "where" notice is served.
- 4.12 It shoul be arguably clear that both statute and rule are to be considered "limitations of action", and (absent some form of justifiable tolling appearing in the record) the Board lost jurisdiction to hear these allegations on 29 November 2012.
- 4.13 Without jurisdiction to hear the allegations the board should be impotent to do anything other than enter an order of dismissal.
- 4.14 Petitioner asks this court to vacate allegations one, two, and three with prejudice.

### FIFTH GROUND

- 5.1 DID THE DEPARTMENT HAVE LEGAL AUTHORITY TO REQUIRE PETITIONER TO PROVIDE A URINE SPECIMENT DIRECTLY TO THE DEPARTMENT ON 27 DECEMBER 2012?

#### ARGUMENT

- 5.2 Condition #3 of the Order revoking CDFS and Imposing conditions of supervision provides:
- 5.3 "You must submit to periodic and random drug and/or alcohol monitoring through an agency approved by your cco and sign a full release of information allowing the treatment or monitoring agency to release information to your cco, and the Indeterminate Sentence Review Board (ISRB)".
- 5.4 This document is signed by Thomas Sahlberg (ISRB), counter-signed by Mark L. Miller (Petitioner) and witnessed by Debie [sic] R. Garner (Department).
- 5.5 This instrument of agreement further contains an "understanding clause", which provides (in relevant part) "I fully understand and agree, in consideration of granting parole, to observe and abide by said conditions." These provisions combine to demonstrate the intent of these parties is that in exchange for granting Petitioner parole, he agrees to submit to drug and/or alcohol monitoring through an agency approved by his cco. [Appendix -A-, Ex #2].
- 5.6 Petitioner is only subject to those conditions of supervision authorized by the Board. Furthermore, the Department may only enforce those conditions authorized by the Board, and in the manner provided for in the order.

- 5.7 Under a plain and simple reading of the condition, the Department lacked legal authority to: (1) Require Petitioner provide a urine specimen directly to the Department; and (2) If (assuming arguendo) the Department possessed transient authority to obtain the specimen directly from Petitioner in order to transmit the specimen to the approved agency for testing, the Department lacked legal authority to directly perform testing on the specimen obtained from Petitioner.
- 5.8 "[W]e impute an intention corresponding to the reasonable meaning of the words used, and give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. Wright v. Dave Johnson Insurance, Inc., 167 Wn App 758, ¶15, 275 P3d 335, 346 (2012, Div 2). citing Hearst Communications, Inc. v. Seattle Times, Co., 154 Wn 2d 493, 503-04, 115 P3d 262 (2005), as cited by Oliver v. Flow International Corp., 137 Wn App 655, 659, 155 P3d 140 (2006, Div 1).
- 5.9 It is clearly apparent under the terms memorialized in writing as condition #3, Petitioner must submit to drug and alcohol monitoring through a third-party agency approved by Petitioner's cc. No amount of etimological parsing can convey to the Department the legal authority to controvene these written mandates.
- 5.10 A court does "not interpret what was intended to be written, but what was written." Wright, 167 Wn App at ¶18, citing Oliver, 137 Wn App at 659, citing Hearst, 154 Wn 2d at 504.

- 5.11 To prove the intent of contracting parties, a party may offer extrinsic evidence of the context surrounding an instrument's execution. But extrinsic evidence is relevant only to determine the meaning of specific words and terms used, not to show an intention independent of the instrument or to vary, contradict, or modify the written word". Wright, supra.
- 5.12 It is manifestly evident that condition #3 requires petitioner "to submit to periodic and random drug and/or alcohol monitoring through an agency approved by [Petitioner's] cco...." It is further evident that because Petitioner must sign a full release of information allowing the treatment or monitoring agency to release information to Petitioner's CCC (and the ISRB) this agency cannot be the Department.
- 5.13 A fundamental principal of Washington contract law is that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. Washington Federal Savings and Loan v. Alsager, 165 Wn App 10, 15, ¶9, 266 P3d 905 (2011, Div 1). The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs. Id.
- 5.14 The uncontestible fact that the Department lacked the "authority of law" necessary in order to require Petitioner to provide a specimen directly to the Department for testing, lays the entire matter on the doorstep of **Article 1, Section 7**, of our State Const., (as well as Amendment IV, U.S. Constitution). Absent the legal authority to obtain and test Petitioner's specimen, the Department's actions clearly constitute an illegal search and seizure under both constitutional



provisions. (Accord State v. Ladson, 138 Wn 2d 343, 979 P2d 833 (1999) holding that pretextual stops are seizures made "without authority of law" and thus are prohibited by our State Constitution).

5.15 The question now before this court is whether the Department had legal authority to require Petitioner provide a urine specimen directly to the Department on 27 December 2012?

5.16 The rule is that where rights and duties are memorialized in writing, a court does not interpret what was intended to be written, but what was written. Wright, 167 Wn App at ¶18.

5.17 The entire panoply of contract law rests on the principle that one is bound by the contract which he voluntarily signs. Wash. Fed'l Savings & Loan, 165 Wn App at ¶9.

5.18 The terms of the condition drafted by the Board - at the behest of the Department - to be enforced upon Petitioner, expressly require all drug and/or alcohol monitoring to be performed by a third-party agency approved by Petitioner's CCO.

5.19 Under these same terms the Department is clearly and incontestably [sic] prohibited from: (1) requiring Petitioner to provide specimens directly to the Department; and/or (2) Directly testing any specimen provided by Petitioner.

5.20 Because the actions of the Department are repugnant to our Constitution, as well as the intent of the parties as expressed in condition #3, this Court should reverse and vacate violations #4 and #5.

## SIXTH GROUND

- 6.1 DOES AN UNCORROBORATED RESULT FROM AN ON-SITE  
DRUG SCREEN VIOLATE THE HEARSAY PROHIBITION  
OF WAC 381-70-400?

### ARGUMENT

- 6.2 WAC 381-70-400, provides in relevant Part:
- 6.3 "... If the sole evidence to support the allegation is hearsay that would be inadmissible in a Superior court proceeding, and is not substantiated or corroborated, the board shall not enter a finding of guilt...." (emphasis added). See Appendix -C-.
- 6.4 "Hearsay" is defined as an out of court statement offered as proof of the matter in issue.
- 6.5 Under the facts now being reviewed, there exists not the least scintilla of evidence in support of the allegations charged as #4 and #5 -- relating to the allegations of using drugs.
- 6.6 As a preliminary matter, the alleged result of the on-site drug screen has been contested from the outset. Only the declarations and testimony of the Department are offered in support of the allegation -- both the specimen and test strip were destroyed at the direction of CC03 Ronda Nielsen.
- 6.7 The question presented to the ISRB is whether Petitioner used drugs, thereby violating conditions of his parole. In support of the Department's proposition that Petitioner violated this condition, the Department provides testimony indicating that an on-site screen [that is not admitted into evidence] provided a positive indication.

- 6.8 Even assuming, arguendo, the on-site test did return a positive result, the evidentiary deficiency is two-fold: (1) There exists nothing in the record aside from the Department's testimony to support that allegation; and (2) No evidence or testimony was offered to establish the reliability of the testing procedure.
- 6.9 Department officers have no special knowledge, education, or training respecting the test's accuracy, reliability, or margin for error. See **Daubert v. Merrill Dow Pharmaceuticals, Inc.**, 113 S. Ct. 2786, 2797, 509 U.S. 598 (1993) "... In the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error...."
- 6.10 Not an iota of testimony was offered at the hearing with respect to determining at what point a specimen is: (1) Determined to be positive under Department Policy; (2) at what point the subject specimen was determined to have a positive result for each alleged substance; (3) No evidence or testimony was offered or presented that the unit was in proper working order or properly calibrated; and (4) No testimony or evidence was presented with regard to the accuracy or error rate for the specified testing system.
- 6.11 In a nutshell, the only "evidence" offered in support of the Department's allegation was an unsupported, arbitrary conclusion that the test produced a positive result, and that the result was accurate, without providing a foundational support to either claim. The Department then destroyed the single piece of evidence that would support their claim and lay Petitioner's challenges to rest: the testing unit itself.

- 6.12 The court should take special note of the Department's recent modifications to DOC 420.380 - Drug & Alcohol Testing. This policy previously permitted confirmatory retesting using Gas Chromotography/ Mass Spectrometry (GC/MS) as well as the National Institute of Drug Abuse (NIDA) cut-off standards (250 ng/ml for opiate class compounds, and 500 ng/ml for Amphetamine class compounds) anytime an offender challenged test results. This court may also take judicial notice of the fact that confirmatory retesting has exonerated Petitioner of similar allegations on numerous prior occasions. [See Appendix -A-, Ex #7, page 3 of 6; and Ex #4, page 1 of 5, VR report submitted on 01-12-2006; VR Dismissed on 01-19-2006 after confirmatory retests established no violation was committed, parole was reinstated].
- 6.13 The only evidence that was admitted at the hearing - or is available for judicial review - are the bald assertions of the Department that the test result was positive, without a scintilla of factual evidence on which to rest that assertion.
- 6.14 No court of record would allow the conclusory testimony of the Department, nor admit the results of the testing process, absent at least minimal scientific and foundational safeguards. Not the least of which is establishing the test's accuracy and margin for error regarding each substance tested for.
- 6.15 Pursuant to the Board's own rules, **WAC 381-70-400** these violations must be dismissed.

## SEVENTH GROUND

- 7.1 DOES THE UNCORROBORATED RESULT OF AN ON-SITE  
DRUG SCREEN CONSTITUTE "SOME EVIDENCE"

### ARGUMENT

- 7.2 It has long been determined that prisoners are not stripped of their constitutional rights at the prison gates. **Wolff v. McDonnell**, 418 U.S. 539, 574 (1974). See also **In re Reismiller**, 101 Wn 2d 324 (1984).
- 7.3 Paroled offenders are entitled to even greater protections and evidentiary standards. See **RCW 9.95.120**; **WAC 381-70-160** [Appendices -B- and -C-]; **Gagnon v. Scarpelli**, 411 U.S. 778 (1973).
- 7.4 Though closely related in principle, there are two diverse evidentiary standards applicable to these disciplinary proceedings. Parole revocation proceedings utilize the preponderance of the evidence standard [**RCW 9.95.120**]; and Prison disciplinary proceedings utilize the "some evidence" standard".
- 7.5 Petitioner addresses the issue presented under the lesser standard to establish the fallacy of the Board's reasoning.
- 7.6 This court's review under the "some evidence" standard is limited to determining whether an action is so arbitrary and capricious as to deny Petitioner a fair hearing. **In re Burton**, 80 Wn App 573, 582 (1996).
- 7.7 The clear and incontestable [sic] facts of record demonstrate precisely how arbitrary and capricious the decision of the Board is.

- 7.8 First, the result of the on-site test has been contested and disputed from the outset. No evidence or testimony was offered with respect to the accuracy, reliability, or margin for error of the testing unit.
- 7.9 No evidence or testimony was offered to establish at what point a specimen was/is considered positive for any given substance.
- 7.10 No evidence or testimony was offered to establish at what point the specific test utilized returned a positive result for a specific substance.
- 7.11 No evidence or testimony was presented to establish the testing unit was properly calibrated and/or functioning.
- 7.12 Department personnel destroyed both the specimen tested and the unit purported to give the positive result.
- 7.13 The Department withheld the fact that **DOC 420.380** permits an offender to provide a second specimen for testing **on-site** if he contests the accuracy or result of the first test. [420.380 - VIII(2)].
- 7.14 The Department denied confirmatory retesting based upon Nielsen's **abiding** belief the test was accurate. Nielsen has no special knowledge, education, or training, such that her opinion as to the test's accuracy is less arbitrary or capricious than a randomly selected person. [See Appendix -A-, Ex #9, DOC 420.380 Attachment 1].
- 7.15 Evidentiary standards must be founded upon more than arbitrary speculation, or the ever-changing vagaries of Departmental Policy.

### CONCLUSIONS

- 8.1 Under both the State and Federal due process provisions of our constitutions, Petitioner is entitled to some kind of hearing before the ISRB may revoke his CDFS at the request of the Department. (**Downey**, supra; **Fuentes**, supra).
- 8.2 Petitioner is also entitled to a written statement of the evidence relied upon, and the reason for the disciplinary action. **Burton**, supra.
- 8.3 The Department's request to the ISRB to revoke Petitioner's CDFS was made outside of the procedural protocols set forth in **WAC 381-70-040**, and thus, lacked legal authority.
- 8.4 Violations one, two, and three were not heard for seventy days after service of the Notice of Violation; In accord with both **RCW 9.95.120** and **WAC 381-70-160** the ISRB lacked jurisdiction and authority to hear these allegations and they must be dismissed.
- 8.5 Under the express terms of Petitioner's Conditions of Supervision, the Department lacked legal authority to: (1) Obtain a urine specimen from Petitioner for testing; or (2) Submit for testing any specimen provided. Because the Department lacked legal authority to obtain the specimen, the requisition of Petitioner's specimen constitutes an illegal search and seizure in violation of Article 1, Section 7, and U.S. Amendment IV.
- 8.6 **WAC 381-70-400** prohibits the Board from entering a finding of guilt based solely on uncorroborated hearsay.

- 8.7 The only evidence admitted at the hearing in support of allegations four and five is the testimony of Department officers.
- 8.8 Department officers have no special knowledge, education, or training regarding the accuracy, reliability, or margin for error of the utilized test.
- 8.9 Department officers then ordered both the specimen and test strip destroyed -- and denied Petitioner confirmatory retesting using GC/MS, or the less accurate but immediately available secondary on-site test. (which is permitted to an offender under ~~current~~ **DOC 420.380** Drug testing Policy).
- 8.10 Finally, the repeal of the termination provision of the ISRB [**RCW 9.95.0011**] by an act relating to the management of sex offenders violated art II, sec 19, Washington Constitution and should be deemed a nullity. [**Thompson** (sic), *supra*].
- 8.11 The remainder of the act as it relates to sex offenders remains constitutional.

**RELIEF REQUESTED**

- 9.1 1) Declare the repeal of the termination provision void and of no force or effect;
- 9.2 2) Reverse and vacate all orders of the board related to revoking/rescinding Petitioner's CDFS, and all subsequent orders.
- 9.3 3) Declare the ISRB is required to provide a parolee minimal due process before revoking a CDFS;



- 9.4 4) Declare the Department has a duty to utilize protocols established by statute and regulation when making requests to the ISRB to modify, amend, or revoke release conditions of a parolee.
- 9.5 5) Declare the Department was not authorized to obtain a urine specimen from Petitioner, or to test any specimen obtained.
- 9.6 6) Declare the on-site testing system - as used and applied - inadmissible as lacking a scientific foundation.
- 9.7 7) Declare **WAC 381-70-400** requires a verdict of NOT GUILTY where the only evidence offered to support the allegation is uncorroborated hearsay.
- 9.8 Order Petitioner's immediate release from custody and ORDER the ISRB to issue a Certificate of Final Discharge.

DATE: 25 March 2013

/S/ Mark L. Miller

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Mark L. Miller  
P.O. Box 888  
Monroe WA 98272

I, Mark Lee Miller, certify that I have read the foregoing amended Petition, I know its contents, and believe the same to be true.  
Done on this 15<sup>th</sup> day of July, 2013, at Monroe, Washington.



Mark L. Miller

E. Oath of Petitioner

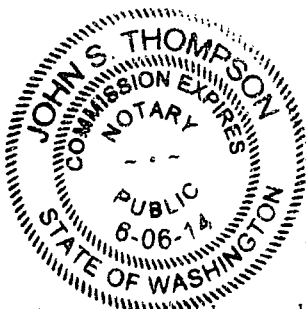
THE STATE OF WASHINGTON )  
 ) SS  
COUNTY OF MASON )

After being first duly sworn, on oath, I dispose and say, that I am the petitioner, that I have read the petition. I know it's contents, and believe that the petition is true.

5 March 2013  
Date

[Signature]  
Signature of petitioner

SUBSCRIBED AND SWORN to me this 5 day of March, 2013.



John S. Thompson  
NOTARY PUBLIC in and for the State of Washington  
Residing at Mason County

My commission expires: 6/6/14

If a Notary is not available, explain why none is available and indicate who can be contacted to help you find a Notary:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Then sign below:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

Dated at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_,  
(City and State)

\_\_\_\_\_  
Signature of Petitioner

\_\_\_\_\_  
Print/Type Name